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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 771

BRITISH AMERICAN OIL PRODUCING COMPANY,
Petitioner,

vs.

D. M. BUFFINGTON AND C. R. SMITH.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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D. M. BUFFINGTON AND C. R. SMITH.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

J. J. Dorr, the owner of an oil and gas lease on a section of undeveloped land in Pecos County, Texas, entered into a letter agreement with D. M. Buffington and C. R. Smith for the drilling of a test well on said lease, wherein he

agreed to pay them $3,000.00 and to transfer to them a one-fourth interest in such lease; the clauses of said agreement directly involved in this suit being as follows:

> *"It is further understood and agreed that in the event said well is a producer, we are to have the preference of all future drilling operations, at the prevailing price.*
>
> "It is further agreed that in the handling of this as a joint venture, that there is to be no expense as overhead charged upon either side."

The test well was drilled, was a commercial producer of oil, and four additional wells were drilled upon the section in question prior to the assignment by Dorr to British-American Oil Producing Company of a one-fourth interest in the lease.

On February 15, 1938, defendant Dorr executed to plaintiffs Buffington and Smith an assignment of an undivided one-fourth interest in the leasehold estate in question. Thereafter Buffington and Smith assigned one-half of their one-fourth interest in said lease to A. J. Gibson and Richard Hamm, who in turn assigned said one-eighth interest to the British-American Oil Producing Company. On or about August 1, 1938, J. J. Dorr assigned his three-fourths interest in said lease to the British-American Oil Producing Company, reserving an oil payment of $154,687.50 and thereafter, the leasehold estate was owned seven-eighths by the British-American Oil Producing Company, and one-eighth by Buffington and Smith. British-American thereupon began to operate the lease.

It was found that the land in question was located in a high pressure gas area which, in the opinion of the geologist of British-American Oil Producing Company made it unsafe and inadvisable to drill thereon with cable tools. He recommended that further drilling be done with rotary equipment. On August 31, 1938, British-American Oil Produc-

ing Company notified Buffington and Smith of their plan to drill the remainder of the wells with rotary and requested them to submit a bid covering the drilling of wells with that type of equipment. On September 1, 1938, Buffington and Smith replied, saying that the agreement did not require the use of rotary equipment. They declined to submit a bid for future work (R. 159). Buffington, at the trial, admitted that one of two recognized methods of determining the prevailing contract price for drilling was through competitive bidding (R. 207). In view of the taking of such positions on the part of Buffington and Smith, British-American made a contract for the drilling of five wells and later contracted for and drilled the other wells drilled by them, keeping Buffington and Smith advised of the progress made. Between September 1, 1938, and the trial of this cause on September 19, 1939, twenty producing wells were drilled upon said land by British-American at the contract price of $2.00 per foot, and it was to recover alleged lost profits on such drilling that this suit was instituted, in the District Court of the United States for the Western District of Texas.

The court propounded certain interrogatories to the jury in the case, in response to which questions the jury found that there was a prevalent general, customary price in the territory in question for the drilling of wells, and that such price was $2.50 per foot. That at such contract price plaintiffs would have made a profit of $1,250.00 per well, or a total of $25,000 on the twenty wells drilled (R. 74-75).

The District Judge regarded the verdict advisory only, but entered judgment in favor of the plaintiffs against the defendants Dorr and British-American Oil Producing Company for $25,000, without prejudice to the right of plaintiffs to assert a claim for damages on any additional wells drilled upon said land. He rendered judgment in favor of British-American Oil Producing Company on its cross-action

against plaintiffs for $25,382.46, being one-eighth of the total sum he found British-American had expended on said lease, and offset one judgment against the other (R. 91-96).

At the same time he filed findings of fact and conclusions of law (R. 76-91). With respect to the contractual provision in question, he concluded that same was sufficiently definite and certain to be enforced. While he found and concluded that a mining partnership existed, he evidently based his judgment on the further finding and conclusion (R. 86) that the provision of the contract sued on is a "*covenant running with the lease, a profit a prendre or equitable servitude which attached to the lease*", binding on British-American Oil Producing Company as an assignee of an interest in the lease. He obviously did not treat the drilling contract as a partnership obligation, since he considered the full amount of the alleged damage as a *personal obligation* of Dorr and British-American Oil Producing Company rather than an obligation of the so-called partnership.

Defendants moved for a directed verdict, but their motions were denied. (R. 358-372). They also moved to set aside the verdict of the jury and to render judgment for defendant, etc. These motions were overruled and the aforementioned judgment was rendered.

On appeal the United States Circuit Court of Appeals for the Fifth Circuit (Justice Hutcheson dissenting) affirmed, on December 19, 1940, the judgment of the trial court in holding that the contractual provision in question was sufficiently definite and certain to be enforced and held that the plaintiffs were not in default except as to the first well, drilled by the defendant, but were ready, able and willing to drill the other nineteen wells, and specifically held that defendant, British-American Oil Producing Company took its assignment subject to the contract and was bound by its terms, but eliminated the damages allowed as lost profits on

the first well drilled by the defendant, in the sum of $1,093.75, and reduced the balance of the recovery in favor of the plaintiffs by one-eighth, on the ground that the plaintiffs would have been liable for their proportionate one-eighth of the drilling costs, thereby diminishing the judgment in favor of the plaintiffs from $25,000.00 to $20,781.25, offsetting the same against the judgment in favor of British-American Oil Producing Company on its cross action for $25,382.46, leaving judgment in favor of British-American Oil Producing Company for $4,601.21 instead of $382.46, and released Dorr from liability.

Defendant, British-American Oil Producing Company, filed a petition for rehearing in the Circuit Court of Appeals on January 8, 1941, which was overruled by said court on the 14th day of January, 1941.

II.

Jurisdiction.

(a) The judgment to be reviewed is dated December 19th, 1940 (R. 403). There was a petition for rehearing, which was filed January 8, 1941, and was overruled January 14th, 1941 (R. 411).

(b) The statutory provision which is believed to sustain the jurisdiction of this Honorable Court is Section 347 of Title 28, subdivision (a) of the United States Code (Judicial Code, Sec. 240).

III.

Questions Presented.

1. Whether or not the provision in the contract giving plaintiffs, Buffington and Smith, "the preference of all future drilling operations, at the prevailing contract price" was sufficiently complete, definite and certain to support

the judgment rendered in the court below. The majority of the court held that it was. The dissenting member of the court held that it was not.

2. Whether the uncertain language of the alleged option contract could be, and was, made certain by proof outside of the contract by a method not pointed out by its terms, especially in view of the undisputed testimony of plaintiff Buffington himself that there were two ways of determining the contract price, one being by favoritism and the other by competitive bidding, and the contract not indicating which method was to be followed. The majority of the court held in the affirmative, over the dissenting opinion of the third member of the court.

3. Whether after the defendant acquired an interest in the lease, which required continuous drilling operations, and tendered the plaintiffs the opportunity to drill all the other wells to be drilled, who rejected the option tendered them, following which the defendant immediately placed itself in a different position by contracting for the drilling of the remainder of the wells, such rejection was an abandonment of their right, or option, if any, to drill all of the remainder of the wells. The majority of the Circuit Court of Appeals held that their rejection of the offer only applied to the first well, since they later offered to do the drilling in accordance with the contract. The dissenting member of the court held that the option was rejected in its entirety.

4. Whether after the plaintiffs were tendered the opportunity to drill all of the wells and defendant British-American entered into a contract for the drilling of the first five wells, thereby placing itself in a different position, the plaintiffs could recover damages on the first five wells drilled by the defendant. The majority of the court held that they could not recover for the drilling of the first well but could

recover damages for not being allowed to drill the second, third, fourth and fifth wells.

5. Whether the prevailing contract price was more than $2.00 per foot, at which price all of the wells were contracted by the defendant. The majority of the court held that it was, in the face of the undisputed testimony that there were two methods of determining the prevailing contract price, one being by favoritism and the other being by competitive bidding. The dissenting member of the court held in the negative.

6. Whether a partner, joint adventurer, or tenant in common could make a profit on the operation of the lease at their joint expense, there being nothing in the contract to show that such was the intention of the parties, as will appear from an examination of the contract, the pertinent part of which is set out hereinabove under the "Summary Statement of the Matter Involved," page 2.

7. Whether the alleged option in question, not having been assumed by defendant British-American, was binding upon it personally. The Trial Court held that it was, which holding was sustained by the majority of the Circuit Court of Appeals.

8. Whether the alleged option in question was either a covenant running with the leases, a profit a prendre, or equitable servitude, and binding, as such, on the interest of the defendant British-American in the lease. The trial court held that it was, which holding was sustained by the majority of the Circuit Court of Appeals.

9. Whether the plaintiffs could sue the defendant, British-American, as a partner and obtain a personal judgment against it for a partnership obligation without an accounting between the parties. The judgment of the trial court and of the Circuit Court of Appeals holds that in effect.

10. Whether it was the duty of the plaintiffs, alone, to make strict proof of their earnings in the drilling of other wells so as to minimize their damages herein. The trial court and the Circuit Court of Appeals, in effect, held that it was not their duty, although all of the facts as to their activities and the amount of profits earned by them in the drilling of other wells was exclusively within their knowledge.

IV.

Reasons Relied On for the Allowance of the Writ.

A.

The decision of the Circuit Court of Appeals that the contractual provision upon which plaintiffs predicate their case is not too incomplete, indefinite and uncertain in its terms to support the judgment rendered, is an erroneous decision of an important question of local law and is in conflict with the applicable local and other decisions, including those of other Circuit Courts of Appeals. *Emery Bros.* v. *Mutual Benefit Oil Co.*, 175 Pac. 210 (Okla.); *Forester-Davis Motor Co.* v. *Slaterbeck*, 98 Pac. (2d) 17 Okla.; *Wynne et al.* v. *McCarthy et al.*, 97 F. (2d) 964-970; *American Merchant's Marine Insurance Company* v. *Letton*, 9 F. (2d) 799-801; *Jordan et al.* v. *Buick Motor Company et al.*, 75 F. (2d) 447; *Spivey et al.* v. *Saner-Ragley Lbr. Co. et al.*, 284 S. W. 210-214 (Tex. Com. App.); *Radford* v. *McNeny et al.*, 104 S. W. (2d) 472, and *Canady et al.* v. *Martin et al.* (Tex. Com. App.), 98 S. W. (2d) 1009.

B.

In holding that the uncertain language of the alleged option contract could be, and was, made certain by proof outside of the contract *by a method not pointed out by its*

terms, the majority of the Circuit Court of Appeals rendered an erroneous decision of an important question of local law and is in conflict with the applicable local and other decisions. *35 Corpus Juris 1009; Strait* v. *Fay*, 82 N. E. 648 (Illinois); *Gaston* v. *Sigmund*, 29 Md. 334; *Haskell Motor Company* v. *Remington*, 25 S. W. (2d) 913 (Tex. Com. App.); *Texas Employers' Ins. Assn.* v. *Moore*, (Tex. Com. App.) 56 S. W. (2d) 653; *Brooks* v. *Federal Surety Co.*, 24 F. (2d) 884, and *Keating* v. *Michael*, 242 S. W. 563 (Arkansas). It being undisputed, and plaintiff Buffington himself having testified, that there were two ways of determining the contract price, (1) as a matter of favoritism and (2) by competitive bidding, the failure of the contract to point out which method would be followed and how, when and where this prevailing price would be determined, rendered the contract too indefinite to be enforced.

C.

Having held that the plaintiffs rejected the option, if any, because of the requirement for rotary drilling when the defendant tendered them the opportunity to drill all of the wells, following which said defendant immediately entered into a contract for the drilling of five wells and later for the drilling of the rest of the wells, the Circuit Court of Appeals, in holding that the option was separable as to each well and in not holding that since the plaintiffs had refused to drill any of the wells with a rotary machine they lost the option, rendered an erroneous decision of an important question of local law and is in conflict with the applicable local and other decisions. *Minneapolis & St. Louis Ry. Co.* v. *Columbus Rolling Mill Co.*, 119 U. S. 149; *Volume 10, Texas Jurisprudence*, page 450, Sec. 261, and page 384, Sec. 317; *Hausler* v. *Hardingill Co.* (Tex. Com. App.), 15 S. W. (2d) 548; *South Texas Telephone Co.* v. *Huntington*, 121

S. W. 242; *Webber* v. *Grand Lodge of Ky.*, 169 Fed. 522, 95 C. C. A. 20, paragraphs 7 and 8; *Pollack* v. *Pollack*, 46 S. W. (2d) 292 (Tex. Com. App.); *Universal Life & Accident Co.* v. *Sanders*, 102 S. W. (2d) 405 (Tex. Com. App.); *Moore* v. *Jenkins*, 109 Tex. 401, 211 S. W. 975 (Texas Supreme Court); *Restatement of the Law on Contracts*, page 484, Sec. 323; 13 *Corpus Juris., Title Contracts*, Sec. 538; 6 R. C. L., Sec. 525; *Price* v. *Stonega Coke & Coal Co.*, 26 Fed. Supplement 172; *Kolachny* v. *Galbreath*, 110 Pac. 902; *Willbanks* v. *Shelby et al.* (Tex. Com. App.) 227 S. W. 371, and *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587.

The majority of the Circuit Court of Appeals held that, although the plaintiffs, when tendered the opportunity to drill all the remainder of the wells on the lease, rejected it, because of the requirement for rotary drilling, not as to the first well only but in its entirety, and at once sued the defendant for the breach of its option contract, they did not, thereby, breach the alleged contract in its entirety, but only as to the first well drilled. This in spite of the fact that, immediately upon being notified of the rejection of the opportunity to drill, defendant placed itself in a different position by immediately contracting for the drilling of the first five wells drilled on the lease, and later followed this by contracts covering the balance of the wells to be drilled. This holding was erroneous because the assignments to the lease contracts required continuous drilling in the development of the property. The dissenting member of said court held to the contrary.

D.

Having held that the plaintiffs refused the option, if any, when defendant tendered them the opportunity to drill all of the wells, following which said defendant immediately entered into a contract for the drilling of five wells, the Cir-

cuit Court of Appeals, in holding that the plaintiffs could recover damages, if any, on the second, third, fourth and fifth wells, rendered an erroneous decision of an important question of local law.

E.

In holding that the prevailing contract price was other than $2.00 per foot, the price at which the wells were contracted by the defendant on the bid of a competent drilling contractor, the Circuit Court of Appeals rendered an erroneous decision of an important question of local law.

F.

In holding that the contract showed on its face that it contemplated that it was intended that plaintiff should make a profit on the operation of the lease, either as partners, joint adventurers, or tenants in common, the Circuit Court of Appeals, over the dissenting opinion of Judge Hutcheson, rendered an erroneous decision of an important question of local law and is in conflict with applicable local and other decisions. *Howard et al.* v. *Stillwell Bierce Mfg. Co.*, 35 L. Ed. 147, 139 U. S. 199; *Shannon* v. *Schaffer Ref. Co.*, 51 F. (2d) 878; *Wichita Falls Electric Co.* v. *Huey*, 246 S. W. 692; *Amarillo Oil Co.* v. *Ranch Creek Oil & Gas Co.*, 271 S. W. 145; *Eureka Producing Co.* v. *Hoyt*, 266 S. W. 203; *Volume* 20 R. C. L., page 877; *Volume 33, Corpus Juris., Joint Adventures*, page 860, Sec. 65; *Volume 47 Corpus Juris.*, page 786, Sec. 230; *Wilson* v. *Hunt*, 270 S. W. 263.

G.

In sustaining the trial court in holding that the alleged option in the contract was personally binding on the defendant, British-American Oil Producing Company, the Circuit Court of Appeals rendered an erroneous decision of an

important question of general law and is in conflict with the applicable decisions of the Texas Courts. *Kynard, et al.*, v. *Tucker,* 171 S. W. 1086; *George* v. *Blumberg, et al.*, 211 S. W. 309; *McNeill* v. *Cage, et al.*, 85 S. W. 57; *Martin* v. *Rutherford et al.*, 153 S. W. 156; *Montgomery et al.* v. *Craeger,* 22 S. W. (2d) 463.

H.

In sustaining and in not overruling the holding of the trial court that the alleged option in question was either a covenant running with the leases, a profit a prendre or equitable servitude which attaches to such leases, and that defendant, British-American Oil Producing Company, was bound by the terms of the same, the Circuit Court of Appeals rendered an erroneous decision of an important question of local law and is in conflict with the applicable local and other decisions. *Lemar* v. *Garner,* 121 Tex. 502, 50 S. W. (2d) 769; *Gordon* v. *Empire Gas & Fuel Co.*, 63 F. (2d) 487; *Ehlinger et al.* v. *Clark,* 117 Tex. 547, 8 S. W. (2d) 666; *Thuss's Texas Law of Oil & Gas,* page 128; 19 *Corpus Juris.*, page 870; *Mills & Willingham on the Law of Oil & Gas,* page 233; *Emerson et al.* v. *Little Six Oil Co.*, 3 F. (2d) 265; *G. C. & S. F. Ry. Co.* v. *Smith,* 72 Tex. 122, 9 S. W. 865; *Lakewood Heights Co.* v. *McCuistion,* 226 S. W. 1109; *Montgomery et al.* v. *Craeger* (Tex. Civ. App.), 22 S. W. (2d) 463; *Everett Factories & Terminal Corp.* v. *Oldetyme Distillers Corp.*, 15 N. E. (2d) 829, and *Graham* v. *Omar Gasoline Company,* 253 S. W. 896; 12 Tex. Jur., page 51 and 53.

I.

In not overruling the holding of the trial court that the doctrine of profit a prendre applied to the alleged option in question and rendering judgment holding the defendant, British-American, liable thereunder, the Circuit Court of

Appeals rendered an erroneous decision of an important question of local law and is in conflict with the applicable decisions. 19 *Corpus Juris.*, 870, and *Thuss's Texas Law of Oil & Gas*, page 128.

J.

In sustaining the holding of the trial court that the rights and liability of the parties to this suit, under the lease in question, which was an "unless lease" and not a "drill or pay" type of lease, are to be determined by the law of landlord and tenant, the Circuit Court of Appeals rendered an erroneous decision of an important question of local law and is in conflict with the applicable local and other decisions. *Lemar* v. *Garner*, 121 Tex. 502, 50 S. W. (2d) 769; *Gordon* v. *Empire Gas & Fuel Company*, 63 F. (2d) 487; *Ehlinger et al.* v. *Clark*, 117 Tex. 547, 8 S. W. (2d) 666, and *Mound Valley Vitrified Brick Co.* v. *Mound Valley Gas & Oil Co.*, 258 Fed. 936.

The trial court held, under the authority of *Pierce-Fordyce Oil Association* v. *Woodrum*, 188 S. W. 245 (Tex. Com. App.), that the principles of landlord and tenant applied to an oil and gas lease, although the lease under consideration in the *Woodrum* case was of the old "drill or pay" type, obligating the lessee to begin drilling operations within six months or pay the delay rental provided for in the lease, and the lease in that case, by its express terms, extended to the legal representatives and assigns of the parties.

K.

In holding that the plaintiffs could sue the defendant, British-American, and obtain a personal judgment against it as a partner for a partnership obligation, without an accounting between the parties, the Circuit Court of Appeals rendered an erroneous decision of an important question of local law and is in conflict with the applicable local and

other decisions. *Martin* v. *McBryde*, 21 A. L. R., 12 (On notation page 34); 47 Corpus Juris, page 804; *Crow* v. *Green*, 111 Pa. 637, 5 Atl. 23; *Hardee* v. *Adams Oil Assn.*, 254 S. W. 602 (Tex. Com. App.); *Brodage* v. *Greenwood*, 261 S. W. 453, and *Meriweather* v. *Hardeman*, 51 Tex. 436.

L.

It being the duty of the plaintiffs to minimize their damage and to make strict proof of same, and it appearing that during the period the twenty wells in question were being drilled plaintiffs devoted a part of their time and equipment in the drilling of other wells for which they received compensation, and in view of the further fact that plaintiffs are seeking compensation from the alleged partnership for lost profits, the Circuit Court of Appeals should have sustained the appellant and should have withheld the rendition of any judgment in their favor until they made full disclosure and accounted for the profits derived from other drilling operations carried on by them, which information was entirely within the knowledge of the plaintiffs and not the defendant. *Williston on Contracts*, Volume 3, page 2401; 8 *Ruling Case Law*, page 441; 13 *Texas Jurisprudence*, page 106; *Selma, Rome & Dalton Ry. Co.* v. *United States*, 139 U. S. 560; *United States* v. *D. & R. G. R. Ry. Co.*, 191 U. S. 84; *Barron G. Collier, Inc.*, v. *Peters Bros., Inc.* (Tex. Com. App.), 124 S. W. (2d) 904; *Mount Ida School for Girls, Inc.*, v. *Rood*, 253 Mich. 482, 235 N. W. 227; *Rossman* v. *Blunt*, 104 F. (2d) 877, and *Greenleaf on Evidence*, Sec. 79.

Wherefore, your petitioner prays that a writ of certiorari issue under the Seal of this Court directed to the United States Circuit Court of Appeals, for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said United States Circuit Court of Appeals,

Fifth Circuit, had in the case numbered and entitled on its docket, Number 9475, "British-American Oil Producing Company, et al., Appellants, vs. D. M. Buffington, et al., Appellees", to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of the said United States Circuit Court of Appeals for the Fifth Circuit be reversed, with appropriate directions by this Court, and for such further relief as to this Court may seem proper.

Dated February 15, 1941.

BRITISH AMERICAN OIL PRODUCING COMPANY,
By WILLIAM E. ALLEN,
Attorney for Petitioner.
MAYO E. McKEOWN,
Tulsa, Oklahoma;
LAWTON L. GAMBILL,
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ED M. WHITAKER,
Midland, Texas;
JOHN PERKINS,
Midland, Texas, and
ROBERT M. TURPIN,
Midland, Texas,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 771

BRITISH-AMERICAN OIL PRODUCING COMPANY,
Petitioner,

vs.

D. M. BUFFINGTON AND C. R. SMITH,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals, for the Fifth Circuit, styled British-American Oil Producing Company, et al., Appellants, vs. D. M. Buffington, et al., Appellees, is not yet reported in the Federal Reports, but may be found in the record filed in this suit (R. 396).

II.

Jurisdiction.

This has been stated under subdivision II in the preceding Petition for Writ of Certiorari, to which reference is here made, and, therefore, will not be repeated here.

III.

Statement of the Case.

This has already been stated in the preceding Petition for Writ of Certiorari, under "I", which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the contract in question was sufficiently definite and certain to support an action for damages.

2. The Circuit Court of Appeals erred in holding that the alleged option contract could be and was made certain by proof outside of the contract by a method not pointed out by its terms.

3. The Circuit Court of Appeals erred in holding that plaintiffs, Buffington and Smith, were ready, able and willing to drill the nineteen wells for which a recovery was allowed, but were prevented from doing so by defendant, British-American Oil Producing Company.

4. The Circuit Court of Appeals erred in holding that the option was separable as to each well and that a rejection of the option when the plaintiffs were requested by the defendant to submit a bid for drilling all the wells was not a breach of the contract.

5. The Circuit Court of Appeals erred in holding that the plaintiffs could recover damages for the second, third, fourth and fifth wells drilled by the defendant.

6. The Circuit Court of Appeals erred in holding that the prevailing contract price was other than $2.00 per foot, which was the price at which the wells were contracted by the defendant.

7. The Circuit Court of Appeals erred in holding that the plaintiffs, Buffington and Smith, should profit over and above their associates, including British-American, by the venture, and that if they had drilled the nineteen wells they would have profited to the extent of the damages awarded them.

8. The Circuit Court of Appeals erred in holding that the alleged option was either a covenant running with the leases, a profit *a prendre*, or equitable servitude and was personally binding on the defendant.

9. The Circuit Court of Appeals erred in holding that the plaintiffs could sue the defendant as a partner on a partnership obligation without an accounting between the parties.

10. The Circuit Court of Appeals erred in holding that it was not the duty of the plaintiffs to make a full disclosure and accounting for the profits made by them in other drilling operations carried on by them while the defendant was developing the lease in question.

V.

ARGUMENT.

Summary of Argument.

Point A. Plaintiff Buffington testified that he construed the contract to mean that such details as the kind of derrick erected and who was to erect it, the size of the hole, who should determine when the casing should be set and who would furnish the water for the drilling, would have to be mutually agreed on by the parties (R. 178-9). Under the authorities an agreement which leaves the essential details of the subject matter to a future agreement between the parties is not a contract sufficiently definite and certain to

be enforced. Moreover, no standard was set in the contract by which the prevailing price was to be determined and the testimony of plaintiff Buffington himself that there were two ways of determining the contract price, one being a matter of favoritism and the other by competitive bidding, was undisputed. The contract does not point out which of these methods was to be followed and is, therefore, indefinite and uncertain.

Point B. It is a fundamental rule that extraneous evidence may be resorted to in order to make certain a contract, but *the contract itself must furnish the key for identification. Volume 10, Texas Jurisprudence* 176, Sec. 102, and *Volume 35, Corpus Juris,* page 1009, Sec. 123. This the contract does not do.

Point C. When the defendant, British-American, decided to drill all the remaining wells on the lease with rotary machines, on account of the high gas pressure in the area and the necessity for haste, they wired plaintiffs, on August 31st, 1938, as follows:

> "WE PLAN TO DRILL REMAINDER OF WELLS ON OUR RECENTLY PURCHASED PAYTON LEASE IN PECOS COUNTY USING PORTABLE ROTARY OUTFIT STOP PLEASE SUBMIT YOUR BID IMMEDIATELY COVERING THE DRILLING OF THESE WELLS WITH THIS TYPE EQUIPMENT" (R. 157).

and the plaintiffs answered, the next day, as follows:

> "OUR DRILLING AGREEMENT DOES NOT REQUIRE US TO USE PORTABLE ROTARY MACHINE STOP WE ARE READY TO BEGIN THE DRILLING OF A WELL ON SUITABLE LOCATION ON OUR LEASE AT PREVAILING PRICE IN ACCORDANCE WITH OUR CONTRACT" (R. 158).

This was a rejection of the option, if any, and such a rejection could not be revived by tendering acceptance. *Minne-*

apolis & St. Louis Ry. Co. v. *Columbus Rolling Mill Co.*, 119 U. S. 149. We quote from said case:

> "A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it."

Point D. In declining to use a rotary machine in the drilling of all the wells when the opportunity was tendered to them, as set out in the above telegram, the plaintiffs rejected the option in its entirety. Immediately thereafter the defendant British-American let a contract for the drilling of the first five wells. They were operating under an assignment of a lease contract requiring continuous drilling and, therefore, could not postpone action pending litigation or in the hope that the plaintiffs might recede from their position (see testimony of A. J. Gibson, R. 252). The defendant, therefore, changed its position so far as the five wells were concerned, acting on the faith of the rejection on the part of the plaintiffs. The majority of the Circuit Court of Appeals should not have charged the defendant with any damages by reason of the drilling of these five wells. The court had no right to limit this rejection by the plaintiffs to the first well drilled. If the plaintiffs defaulted in their obligation so far as the first well was concerned, that default applied to the first five wells and, in no event, did the court have the right to allow damages so far as any of these five wells were concerned. Buffington admitted that he and his associate were not in a position to drill the first well with a rotary drilling machine and his telegram shows that he denied the right of British-American to designate rotary equipment for future drilling. Upon receipt of this telegram, British-American awarded a contract at $2.00

per foot, rotary drilling, for the first five wells which it caused to be drilled. A feverish campaign was on in the field. No doubt British-American felt it could make a more advantageous contract on five wells than it could on one. After British-American had contracted the first five wells, Buffington and Smith could not change their minds about rotary equipment and require British-American to breach its contract made for the drilling of the five wells. A separate contract for each well was not necessary. There is certainly nothing in the contractual stipulation that would support such conclusion.

Point E. The undisputed testimony of plaintiff Buffington was that there were two ways of determining the prevailing contract price, one being a matter of favoritism and the other being by competitive bidding (R. 207-8). When the defendant, British-American, obtained contracts for the drilling of all the wells at $2.00 per foot that price cannot be held to have been obtained other than by competitive bidding, and the plaintiffs should be held to the same in determining the damages, if any.

Point F. A partner or a joint adventurer cannot make a profit while he is acting on behalf of his associates unless it clearly appears that such was the intention and this applies, also, to tenants in common in the operation of their joint lease. There is nothing in the contract that indicates that it was the intention of the parties that such profits should be made. The contrary is indicated by the language of the alleged contract, which provides that no overhead was to be charged by either party in the handling of the joint venture.

Point G. There is no evidence that British-American assumed the contractual obligation, if obligation it was. While, in the assignment from Buffington and Smith to Hamm and Gibson of a one-sixteenth interest, assignors reserved their rights under said stipulation, no such pro-

vision appears in the assignment from Hamm and Gibson or from Dorr to British-American. But even if there had been such reservation, it is respectfully submitted that under the Texas decisions British-American is not personally liable. It has been consistently held by the Texas courts that where one purchases real property burdened with a lien or encumbrance, such purchaser does not become liable therefor in the absence of an assumption of such obligation. In other words, the Texas courts recognize a clear distinction between the assumption of the obligation and taking the property subject to the obligation. *Kynard et al.* v. *Tucker*, 171 S. W. 1086, 211 S. W. 309; *McNeill* v. *Cage et al.*, 85 S. W. 57; *Martin* v. *Rutherford et al.*, 153 S. W. 156.

Point H. The provision in the contract giving the preference in all future drilling operations was a personal covenant of the defendant's assignor, J. J. Dorr, and not one running with the land; therefore not binding on the assignee, British-American Oil Producing Company. See *G. C. & S. F. Ry. Co.* v. *Smith*, 72 Tex. 122, 9 S. W. 865, following and citing the rule in *Spencer's Case*, 4 Coke 16, 1 Smith's Leading Cases, 9th Am. Ed. 174.

Point I. The option for the drilling was not a profit *a prendre* for it did not confer the right to take a part of the soil or produce of the land. *19 Corpus Juris*, page 870.

Point J. The principles governing landlord and tenant do not apply, since this was an "unless" oil and gas lease and not a "drill or pay" lease. Under an "unless" oil and gas lease it is held in Texas that the assignee does not assume the obligation either to drill or to pay. Such a lease creates a determinable fee. *Ehlinger et al.* v. *Clark*, 117 Tex. 547, 8 S. W. (2d) 666, and *Gordon* v. *Empire Gas & Fuel Co.*, 63 F. (2d) 487.

Point K. It is a rule of almost universal application that an action *ex contractu*, as distinguished from an action in

equity, is not maintainable between the partners with respect to partnership transactions unless there has been an accounting, or settlement, of partnership affairs. This rule is recognized and enforced in Texas. *Martin* v. *McBryde*, 21 A. L. R., page 12 and annotations; *Pugh* v. *Newbern*, 58 A. L. R. 617; *Meriweather* v. *Hardeman*, 51 Tex. 436, and *33 Texas Jurisprudence*, page 458, Sec. 149.

Point L. It was undisputed that the plaintiffs engaged in other drilling operations while the drilling program was being carried on on their joint lease by the British-American Oil Producing Company. The duty rested on the plaintiffs to minimize their damages. Of course, if they were fully occupied in the drilling of other wells, they could not have their damages and their profits from the other operations with their drilling tools. These profits were peculiarly within the knowledge of the plaintiffs and, therefore, the burden of proof was upon them to disclose how much these profits were, so that the same could be offset against the damages sought to be recovered. *Selmer, Rome & Dalton Ry. Co.* v. *U. S.*, 139 U. S., 35 L. Ed. 266; *U. S.* v. *D. & G. R. Ry. Co.*, 189 U. S. 84, and *Russman* v. *Blunt*, 104 F. (2d) 877.

Argument in Support of Points A and B.

The optional provision of the letter agreement upon which the suit is based is as follows:

> "It is further understood and agreed that in the event said well is a producer, we are to have the preference of all future drilling operations, at the prevailing contract price" (R. 138).

The uncertainties of the contract are shown by the fact that at the very beginning the parties were not able to agree on what it meant. After the telegram sent by British-American on August 31st, 1938 to plaintiffs, offering the plaintiffs the opportunity to drill the remainder of the wells, which

was rejected by them because of the requirement for rotary drilling (see telegram, R. 158), plaintiff Buffington had a conversation with C. E. Wright, representing British-American, about the drilling and in regard to the term "prevailing contract price". We quote:

> "Q. * * * The prevailing contract price, you construed that to mean, I believe you testified that in your conversation with Mr. Wright when he was down there, I think you said after the telegram was given, I believe you stated that you told him you considered that you were willing to drill at the prevailing contract price?
>
> A. That is right.
>
> Q. But that you did not know how you were going to determine that. I think you stated that in your telegram?
>
> A. That is right.
>
> Q. And that is all the answer you ever would make to them as to what you would drill the wells for, wasn't it?
>
> A. No, that we would not submit a competitive bid.
>
> Q. But you never have from that day to this told them how much you would drill them for?
>
> A. No, that we would drill them at the prevailing contract price" (*R., p. 163*).

Thus, it will be seen that the plaintiff himself was at sea as to what the contract meant, in fact in Plaintiffs' reply of date September 1st, 1938, they raised three questions, (a) that they were not required to bid on the work, (b) the locations had to be suitable and (c) the contract price had to be the prevailing one. The majority of the Circuit Court of Appeals relied on the fact that there had been no difficulty whatever experienced between Dorr, Gibson, Hamm and the plaintiffs before the assignment was made by them to British-American, but they overlooked the fact that before each of the said wells were drilled those parties got to-

gether in each instance and agreed upon the terms and provisions. Plaintiff Buffington testified:

> "Whenever we decided to drill a well we would all get together, the entire partnership, consisting of five of us, talked over the location and talked the matter over regarding prices in the district and came to the agreement. The price was around $2.50 a foot, and that was agreeable to all parties to the partnership" *(R., p. 144).*

The testimony of Buffington shows that he expected that from time to time the parties were to get together and agree upon the terms of a contract, but such an agreement is no contract.

> *"An agreement to enter into negotiations and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action." Radford* v. *McNeny 104 S. W. (2d) 472* (Tex. Com. App.).

The majority of the Circuit Court of Appeals were of the opinion that the contract could be made certain by extraneous evidence. That is ordinarily true, but *the contract itself must furnish the key for identification.* See *Vol. 10, Texas Jurisprudence,* page 176, Sec. 102, as follows:

> "That is certain which can be made certain; and it is sufficient if the subject matter can be identified, provided *that the contract itself furnishes the key* to identification, or if matters as to which the contract is uncertain may be rendered certain by a mere mathematical calculation, or by a consideration of the language used and all of the attending facts and circumstances."

See, also, *Volume 35, Corpus Juris,* page 1009, Sec. 123, as follows:

> "A contract need not presently fix all the terms of the new lease; it may furnish a certain and definite

> method for their ascertainment and determination in the future. On the other hand, if terms are left for future ascertainment and no method is provided by which they are to be determined, the contract is void for uncertainty."

See, also, *Strait* v. *Fay*, 82 N. E. 648 (Illinois); *Gaston* v. *Sigmund*, 29 Md. 334; *Haskell Motor Co.* v. *Remington*, 25 S. W. (2d) 913, (Tex. Com. App.); *Texas Employers' Ins. Assn.* v. *Moore*, (Tex. Com. App.), 56 S. W. (2d) 653; *Brooks* v. *Federal Surety Company*, 24 Fed. (2d) 884, and *Keating* v. *Michael*, 242 S. W. 563 (Arkansas).

Argument in Support of Points C and D.

The Circuit Court of Appeals, while conceding that the plaintiffs, by rejecting the offer to drill when tendered to them on August 31, 1938, rejected their right to profits that they might have made on the first well, held that the contract was separable and that their rights under the contract were reinstated when they told C. E. Wright, representing British-American, that they were willing to drill at the prevailing contract price. That argument is fatally defective for three reasons: (a) The repudiation of the essential portion of the contract when performance was due was a repudiation in toto. (b) British-American changed its position in reliance on plaintiffs' repudiation of the obligation to drill. The subsequent tender was not sufficient to renew and reinstate. (c) The general statement made by them that they were willing to drill at the prevailing contract price, in connection with their testimony to the effect that they expected to get together with the parties and agree on the details, did not make the contract any more definite than it had been before. The principles we rely on here are especially applicable to an option contract.

It will be kept in mind that the most that can be claimed for the provision in question is that it was an option. On

the plainest principles of equity and whatever may be their rights as to the last wells contracted, Buffington & Smith are precluded from recovering any lost profit on the five wells drilled by the McCutchen Drilling Company contracted on the refusal of Buffington & Smith to recognize the right of British-American to use rotary equipment.

> "A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it." *Minneapolis & St. Louis Ry. Co.* v. *Columbus Rolling Mill Company,* 119 U. S. 149.

We quote from *Volume 10, Texas Jurisprudence,* page 450, Sec. 261, as follows:

> "When one party repudiates his agreement or declines to perform it at the time when performance on his part is due, this is in itself a breach of the contract which discharges the other party and gives him a cause of action without any affirmative action on his part."

We know of no rule which gives the plaintiff the right to sue on a contract and enforce it after he has repudiated one of the material provisions thereof, especially until he purges himself of his renunciation. We quote from *Volume 10, Texas Jurisprudence,* page 384, Sec. 217:

> "A breach in toto is not essential, a partial breach being sufficient if it be in respect to a material part, or a part which is so essential to the residue that it cannot be supposed that the party not in default would have made the contract without it, or where it evidences an intention by the party in default to rescind or abandon the contract."

There is another well-established principle of law which also defeats plaintiffs' right to recover, and that is the following, which is set out in *Restatement of the Law on Contracts*, page 484, Sec. 323:

> "(1) Where a party to a contract materially changes his position in reasonable reliance on the other party's (a) manifestations of unjustified lack either of intention or of ability, or (b) apparent inability without justification to perform a condition or a promise for an agreed exchange, a subsequent tender of correct performance by the latter party is inoperative to prevent the occurrence of a breach of contract by him at the time when performance becomes due."

The utmost that can be claimed for the provision in question is that it created some character of optional right. As to such agreements and the duty resting upon an optionee, the law is concisely stated in *12 American Jurisprudence*, page 532, as follows:

> "An option must be fully and completely accepted in all its parts and its provisions strictly complied with before it becomes an executory contract."

At page 531, the same author says:

> "Similarly, if an offer has become inoperative because of the act of the offeree in doing something which amounts to a rejection of the offer, the latter cannot afterwards revive the proposal of the offerer by tendering an acceptance of it."

British-American was justified in treating Buffington and Smith's telegram as a rejection of the offer.

However, the type of drilling equipment to be used and the insistence of Buffington and Smith that the location of wells must be satisfactory to them was not the only point of controversy. The principal controversy related to the consideration to be paid for drilling. The stipulation merely

said that the wells should be drilled at the "prevailing contract price". The testimony of plaintiffs' witness Sindorf was to the effect that the contract price for drilling in the area in question ranged from $2.00 to $2.75 per foot. That, in addition to the twenty wells here in question contracted by British-American for $2.00 per foot, Luce & Ice contracted the drilling of certain of their wells for $2.00 per foot (R. 217).

Argument in Support of Point E.

According to the undisputed testimony of plaintiff Buffington there were two methods of determining the prevailing contract price in their field, one being through favoritism and the other being by competitive bidding (R. 208). Since British-American was able to obtain all the contracts for $2.00 per foot, we submit that that price was obtained through competitive bidding. Plaintiffs were certainly not entitled to charge a higher price than British-American had been able to obtain.

There appears to be a dearth of authority as to the meaning of "prevailing contract price" in a situation of this kind and where there is such a broad range in the prices paid for services as the proof shows existed in the oil field in question. In *People of the State of New York ex rel Wm. J. Rodgers* v. *Coler*, 166 N. Y. 1, the New York Court of Appeals wrestled with a statute which provided that wages for a certain class of work should not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the State where such work was done. Concurring in the holding of the Court that the term was too indefinite, Judge Landon made the following observations:

> "It is admitted that the contractor paid less than the prevailing rate of wages. No doubt that is true if the highest rate among the best workmen is the test. But what is the prevailing rate of wages? Is it the

rate that the best workmen, or the largest mass of workmen, or the average workmen can command? Does it depend upon ability? If so, of which grade? Or upon numbers? If so, is it the majority of all or of a class? And, if on a class of which class and why? What rights have those who do not come within the dominant class? Does it depend upon supply and demand? Upon fair competition? How can we tell? Must we not conclude that a statute which simply says "the prevailing rate of wages" is too indefinite in its meaning to be made the test or condition of a penalty or forfeiture? When a penal statute leaves doubtful the kind of act it denounces, the accused is entitled to the benefit of the doubt, and though he may not insist upon the doubt, the state, out of self-respect, should refrain from inflicting the penalty."

Beginning at page 15 of their brief, appellees Buffington and Smith cite certain authorities on this point, but we respectfully submit that an analysis of the authorities cited will show that they do not sustain Buffington and Smith's position in this case. They cite *Mickleson* v. *Gypsy Oil Company*, 238 Pac. 194. The contractual provision there construed reads as follows:

> "It is further agreed, and this assignment is made upon the express condition that I, the said D. D. Mickleson, am to have all the drilling for oil or gas to be done by the Gypsy Oil Company, its successors or assigns, upon the premises covered by the leases herein assigned by me, the said drilling to be done at *average* prices that are being paid for such work by the Prairie Oil and Gas Company, the Producers Oil Company, and other good substantial oil and gas companies, so long as I do the drilling in a good workmanlike manner."

It will be observed that the provision is radically different from the provision involved in this suit in that it provides that the consideration shall be the *average* price paid by certain oil companies in the field and thus provides a

key for the ascertainment of the contract price. While the question as to the sufficiency of the provision to sustain a suit for damages on account of its breach was expressly withdrawn by the parties, the court, by way of dictum, observed that it saw no reason why the plaintiff should not maintain an action for damages for lost profits, pointing out that the provision involved in the case under consideration differed materially from the one condemned in *Emery Brothers* v. *Mutual Benefit Oil Company,* 175 Pac. 211, cited and discussed in appellant British-American Oil Producing Company's brief.

Memphis Fur. Mfg. Co. v. *Weymss Fur. Co.,* 2 F. (2d) 429, is likewise cited. This was a purchase and sales contract where the order was accepted on the following basis:

> "Due to the uncertainty of manufacturing, this order is accepted *subject to prices in effect on shipping date,* and our ability to ship. Your valued order received and entered as above."

Holding that the written contract contained a key for determining the price, the court said:

> "The contract did not specifically state the price to be paid for the goods on delivery. To constitute a sale the price need not be definitely fixed at the time the sale is effected, *if the agreement contains express or implied provisions by which it may be rendered certain.* 23 R. C. L. 1278; Leutmeyer *v.* Murdock, 267 F. 158 (C. C. A.); Chenoweth Hardware Co. *v.* Gray, 104 Ala. 236, 15 So. 511, 53 Am. St. Rep. 37; McMahon *v.* Mayor, 22 App. Div. 133, 47 N. Y. 1018; McCann *v.* City of New York, 52 App. Div. 358, 65 N. Y. S. 308. Whether the price to be paid was the market price at the time of delivery, as claimed by defendant, or the price fixed by the plaintiff at the factory, as plaintiff asserts, *the date for determining the price was present and easily ascertainable.* Which of the contentions made is correct is immaterial, in view of the verdict

(hereafter to be considered) returned by the jury and the failure of the plaintiff to assail its action."

Royster Guano Company v. *Hall*, 68 F. (2d) 533, is also cited by appellees Buffington and Smith. That case was a suit by an injured employee who alleged that one of the terms of the settlement of his claim for damages on account of the injuries received by him was that he should be employed by defendant during the rest of his life. As to the terms of the employment, the court said:

> "The fair meaning of the promise was that defendant would furnish plaintiff employment so long as he might live *at the highest rate of wages which it paid for common labor*, with the implied provisos that he perform the work assigned him satisfactorily and that defendant continue in business."

Since the plaintiff was to be employed by the defendant, there was no difficulty in determining the rate of pay as it was the highest rate of wages paid by the defendant itself for common labor.

Argument in Support of Point F.

There was nothing in the contract giving the option (if any) indicating that it was the intention of the parties that plaintiffs, in handling the joint property, were to make a profit over their associates. The presumption of law, in the absence of express agreement, is against the right to make profits. We quote from *Vol. 20, R. C. L.*, page 877, as follows:

> "Right to Compensation.—The general rule is that a partner is not entitled to compensation for services in conducting the partnership business beyond his share of the profits unless there is a stipulation to that effect, and that he has no right by implication to claim anything extra by reason of any inequality of services ren-

dered by him, as compared with those rendered by his copartners. The reason for this rule lies in the fact that each partner, in taking care of the joint property, is practically taking care of his own interest and is but performing his own duties and obligations growing out of the partnership. Furthermore the relative value of the services rendered by the several partners of a firm cannot be estimated and equalized, for it is impossible to see how far the relative knowledge, skill and ability of each enter into the adjustment of the terms of the contract. The courts therefore usually decline to look into the question as to which partner has performed the more onerous duties or as to whether the one has been more skillful or more industrious than the other. And a partner is not entitled to claim compensation for his services in business without a special contract therefor, although he attends almost exclusively to the business, or even takes entire charge of it during the sickness or disability of his associates. This holds true in practically all cases wherein the partnership is a going concern with the partners all alive."

Again, under Joint Adventures, we quote from *Vol. 33, C. J.*, page 860, Sec. 65:

"Compensation for Services.—Unless the contract so provides, no member of a joint adventure is entitled to any compensation for services rendered by him toward the common enterprise, and the fact that one of them is appointed the manager thereof does not change the rule."

Also, under the head of Partnership, *Vol. 47, C. J.*, page 786, Sec. 230:

"Since each member of a partnership is under legal obligation, unless exempted therefrom by agreement, to devote his time and efforts to a reasonable extent to the partnership business, the general rule follows that, in the absence of an agreement therefor, a partner is not entitled to compensation, other than his share of the profits, for his services to the firm, however valuable

> they may be; and it is so provided by statute in a number of jurisdictions. A managing partner is generally held to be in no different position than any other with respect to the application of this rule and, similarly, a partner who does all the work for the firm business, or devotes all his time thereto, while his copartner does no work and devotes no time, has been denied compensation in the absence of agreement therefor."

In *Wilson* v. *Hunt*, 270 S. W. 263, it was held that one copartner was not entitled to recover, in addition to his share of profits, wages for labor in absence of stipulations therefor in the partnership agreement.

Certainly it was not within the contemplation of the parties that the enormous profits, which have been found by the jury, were within the contemplation of the defendant, J. J. Dorr. Nor can it reasonably be said that it was the intention of the parties that they would pay the plaintiffs $2.50 per foot for drilling the wells when they could have, and did obtain contracts for the drilling of them at $2.00 per foot, which was the price actually paid McCutcheon Drilling Company for drilling the twenty wells in controversy.

The last clause of the contract negatives any idea of profit. We quote: "It is further agreed that in the handling of this as a joint venture there is to be no expense as overhead charged on either side." Not only was it intended that neither of the parties was to profit at the expense of the others, but the overhead of the operating party was not to be estimated in determining the expense of the operation.

Argument in Support of Points G, H, I and J.

These points are closely related and will be discussed together. In his conclusions of law the District Judge expressed his view of the stipulation here involved and the nature of the lease contracts as follows:

> "The contract entered into by and between plaintiff Buffington and defendant Dorr on July 30, 1937, was

a valid and legal contract, and the provision therein reading as follows:

"'It is further understood and agreed that in the event said well is a producer, we are to have the preference of all future drilling operations, at the prevailing contract price', is a valid and legal provision" (R. 84).

• • • • • • •

"The provision in the contract sued on herein, if not a covenant running with the leases, is, at least a profit a prendre, or equitable servitude which attaches to such leases, the same being the subject matter thereof and the defendant, The British-American Oil Producing Company, having bought with notice and knowledge of such contract ought to be and is bound thereby.

"An oil and gas lease, though creating a determinable fee estate, *is in the nature of a lease, and not a deed* and the defendant, The British-American Oil Producing Company, having purchased its interest in such leases with notice and knowledge of such contract which related to such leases took subject thereto and is bound thereby" (R. 86).

It is respectfully submitted that the holding of the Circuit Court of Appeals, that the instruments of lease here involved are in the nature of a lease and the application of the law of landlord and tenant in determining the rights and liabilities of the parties, is in conflict with the decisions of the Texas courts, as well as prior decisions of this Court. Whatever may be the conception of such contracts in other States, the law is well settled by the Texas decisions that such instruments, though called leases, are conveyances of a determinable fee on common law limitations and are to be construed accordingly.

The right to use the surface is an incident to the grant in the nature of an easement. *Lemar* v. *Garner*, 121 Tex. 502, 50 S. W. (2d) 769.

In *Gordon* v. *Empire Gas & Fuel Company*, 63 F. (2d) 487, Judge Sibley, speaking for the Court of Civil Appeals, said:

> "It is now settled, though it was not then, that an agreement such as that before us is a *conveyance* on the conditions stated in it of an estate in the minerals in place in the soil, though they be fugitive oil and gas, rather than a mere right to use the land to capture them, and that, where the agreement extends to the exhaustion of the minerals, the estate is a base fee therein. Stephens County *v.* Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S. W. 290, 29 A. L. R. 566; Waggoner Estate *v.* Sigley Oil Co., 118 Tex. 509, 19 S. W. (2d) 27. Furthermore, such agreements have in consequence been held to be *sales* within the constitutional and statutory provisions for the sale of the University lands. Theisen *v.* Robison, Commissioner, 117 Tex. 489, 8 S. W. (2d) 646."

To the cases cited by Judge Sibley, there may be added *Ehlinger, et al.* v. *Clark*, 117 Tex. 547, 8 S. W. (2d), page 666, where the Supreme Court of Texas had under consideration a lease contract similar to the original lease contracts here involved, executed by a county on certain of its school lands. The question was whether or not the transaction amounted to a *sale* and conveyance of the oil and gas within the meaning of the constitutional provision permitting the *sale* of county school lands by the Commissioners Courts. Upholding the contract as a sale, the Court, speaking through the late Chief Justice Cureton, said:

> "Under the contract, as we view it, the county parts with its title to all the minerals in place, and obtains a moneyed consideration of $4,000, and, in addition, the usual one-eighth royalty from the oil produced. That such a transaction *is a sale of the minerals in place* is the established law, we think, in this state."

Also:

> "The language of the contract that the county 'has granted, demised, leased, and let unto the said lessee for the sole and only purpose of mining and operating for oil and gas * * * all that certain tract of land', means plainly that an actual estate in the land, to-wit, the mineral estate, has been conveyed without reservation as to any part of it. Stephens County *v.* Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S. W. 290, 29 A. L. R. 566."

The leases here involved are the modern "unless" except as a part of the consideration the lessee obligated himself to commence a test well on or before September 1, 1937, and drill it to a depth of 2500 feet unless oil or gas should be encountered in paying quantities at a lesser depth or unless water should be encountered in what is known as the Yates sand (R. 104-136). This is the test well for the drilling of which plaintiffs received $3,000 cash and a fourth interest in the lease on the section.

The Circuit Court of Appeals seems to have been influenced by the holding of the Fort Worth Court of Civil Appeals in *Pierce-Fordyce Oil Assn.* v. *Woodrum*, 188 S. W. 245, relied on by the plaintiffs. In the *Woodrum* case the lease contract was of the old "drill or pay" type by which the lessee was obligated absolutely to begin operations for the drilling of a well upon the leased premises within six months from the date of the lease, or thereafter pay to the lessor as rental 50 cents per acre each month that drilling was deferred. Upon payment of $1.00 the lessee had the right to surrender the lease and be released and discharged from further payments. In the event of such surrender the fact was to be evidenced by a deed of surrender duly executed by the lessee and mailed to the lessor. The lease also provided that all covenants and agreements therein contained should *extend to the respective heirs, legal repre-*

sentatives and assigns of the parties. The thing was *in esse* and the lease used the word "assign", hence fulfilled the requirement of the rule in *Spencer's* case. The Pierce-Fordyce Oil Association, by assignment, acquired the interest of the original lessee and held the lease for a considerable period of time without drilling a well or paying the prescribed rental. When sued for accrued rents the Association defended on the grounds that the obligations of the lessee were not binding upon the assignee. On original submission the court held that the Association was not liable for the stipulated rental, but on rehearing held that the agreement to pay rental was a covenant running with the land and since the Association did not avail itself of the privilege of surrendering the lease, it was bound to pay the rental. We have no fault to find with that decision applied to the facts there under consideration. It has no application here. There is a radical difference between the "drill or pay" type of lease and the modern form known as the "unless" lease. *34 Texas Jurisprudence,* pp. 741-745. The enjoyment of the estate created by the Woodrum lease carried with it the correlative duty and obligation to pay rent as does a lease on an ordinary store building. The Oil Association used and enjoyed the estate and was bound to pay the stipulated rental. There was "privity of estate" as to the whole of the leasehold estate.

In other words, in the cited case there was an absolute obligation in the lease contract to pay rental as a consideration for the use of the leased property which plainly was a covenant running with the lease. There was privity of estate growing out of the use and enjoyment of the leased premises, the same as if the property covered by the lease had been farm land or a building used and occupied by the assignee of the lease. In the case at bar the covenant is purely personal and collateral and the enjoyment and use of the leasehold estate is in no respect conditioned upon

compliance with the stipulation. The law of landlord and tenant manifestly has no application.

Mound Valley Vitrified Brick Co. v. *Mound Valley Gas & Oil Co.*, 268 Fed. 936, was a suit for damages growing out of the breach of a contractual covenant by which the Development Company agreed to furnish gas to the Brick Company from wells located upon the Development Company's lease in Labette County, Kansas. The Development Company assigned its rights to the Gas Company. The Gas Company furnished gas for awhile then terminated the contract. The Brick Company sued the Development Company and the Gas Company at law for breach of contract. The court held that the covenant was a personal one and did not bind the assignee. Differentiating the case from landlord and tenant cases the court said:

> "While it is undoubtedly true as contended by counsel for plaintiff, one who accepts an assignment of a lease of real property with the consent of the landlord, or enters into possession thereunder, becomes liable to the landlord for payment of the rent reserved in the lease, and while he continues as such assignee of the lease for breach of its covenant to pay rent the landlord may charge the original lessee on the ground of privity of contract and the sublessee or assignee of the lease on the doctrine of privity of estate. Washington Natural Gas Co. *v.* Johnson, 123 Pa. 576, 16 Atl. 799, 10 Am. St. Rep. 553; Schumucker *v.* Sibert, 18 Kan. 104, 26 Am. Rep. 765; Woodland Oil Co. *v.* Crawford, 55 Ohio St. 171, 44 N. E. 1093, 34 L. R. A. 62; Hogg *v.* Reynolds, 61 Neb. 758, 86 N. W. 479, 87 Am. St. Rep. 522.
>
> "Yet all covenants of parties to a contract are either real or personal, depending on the subject matter of the contract. All contracts of conveyance of real property and all other contracts so closely connected with real property that the benefits or burdens of such contract pass by a conveyance of the property itself are what is termed in the law covenants real. All other covenants or agreements of parties in the nature of covenants in their contracts are personal. Thus the

covenant in a lease to pay rent reserved is a covenant which runs with the possession of the land, and for this reason when the lease is assigned the covenants being for the benefit of the land, and being for the payment of that which arises out of the use and enjoyment of the land, follows the property in the hands of the assignee and binds him to the payment of all rents accruing while he enjoys its possession. In other words, by the very act of assignment of such a contract and its acceptance by the assignee, the privity in estate created between the landlord and the original lessee by the lease passes out of the original lessee into the assignee for the reason that thereby a right in or to the land itself passes. However, as has been seen, the contract here in controversy has no relation whatever to real estate or any right thereto, or title or interest therein, and the covenants or agreements of the parties contained in this contract are therefore purely personal. An action on a personal covenant or agreement will not lie in favor of a person not a party to it, and as a general rule, only the covenantor, his executors and administrators are bound by such personal covenants. Heirs at law are bound when expressly named in the contract. Assignees are not bound at law, although they may be named, but in certain instances they may be charged in equity."

In the case at bar the court did not determine whether the contractual stipulation in question is a covenant running with the lease—the land—a profit a prendre or an equitable servitude which attaches to such leases, but was quite certain it is one or the other and binding on the British-American Oil Producing Company, assignee of an interest in the leases by reason of its purchase of such interest.

Thuss, in his work on the *Texas Law of Oil and Gas*, speaking of profits a prendre, says, page 128:

> "Such a theory would do violence to many of the well settled principles pertaining to oil and gas in Texas."

The theory has been applied in States like Oklahoma where an oil and gas lease is held not to convey an interest in the land but merely to confer upon the lessee an option or privilege to develop the mineral resources of the land and remove the oil and gas. The doctrine might well be applied in such jurisdictions as the optional right or privilege to remove oil or gas fits the general definitions of profits a prendre. In *19 Corpus Juris*, page 870, the author defines the term as follows:

> "Profits a Prendre—1. Nature of Right. The rights to profits, denominated profits a prendre, consists of a right to take a part of the soil or produce of the land, in which there is a supposable value. * * *
>
> "Illustrations. The right to enter upon the land of another for any of the following reasons has been held to be a profit a prendre: To cut grass; to depasture the land; to dig gravel; to keep a mill in repair; to fish in an unnavigable stream; to mine metals generally; to search for and dig coal; to shoot over the land and take game or wild fowl; to take away drifting sand from the beach, or seawood thrown upon the shore; to take driftwood; to take ice; to take iron ore from the land; and to take timber from the land."

The stipulation here involved gave plaintiffs no right to take any of the oil or gas discovered and is clearly not a profit a prendre. Nor is said stipulation a covenant that runs with the land. With respect to such contracts, *Mills & Willingham* in their work on the *Law of Oil and Gas* (page 233) say:

> "Drilling contracts for a money consideration *do not run with the land*, but some drilling contracts create a legal or equitable interest in the lease * * *
>
> "On principle obligations of a drilling contract run with the land *only* when they serve to create a legal or equitable interest therein."

Such covenants run with the land where the driller is to receive a definite portion of the production as a consideration for his services. Otherwise, when the consideration is payable in cash.

The text is in accord with the decision of *Emerson et al.* v. *Little Six Oil Co.*, 3 F. (2d) 256.

Of the Texas rule with respect to covenants, *12 Texas Jurisprudence*, page 51, says:

> "As regards the distinction between personal and real covenants, it has been said that those covenants which are held to run with the land and inure to the benefit of the assignee are such as generally affect the land itself and confer a benefit on the grantor."

As to the rule in *Spencer's* case and the adherence of the Texas courts to that rule, the same author, at page 53, makes these observations:

> "In Spencer's Case (4 Coke, 16, 1 Smith's Lead. Cas., 9th Am. Ed. 174) a leading authority upon this subject, the rule was laid down that, if the covenant extends to a thing in esse, parcel of the demise, annexed and appurtenant to the thing demised, it shall go with the land and shall bind the assignee, although he be not bound by express words, but that if the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which has no being. It has been observed that there appears to be considerable contrariety of opinion on the part of the courts as to whether or not a covenant concerning a thing not in esse at the time of the demise runs with the land without the use of the word 'assigns'. And, on account of the inconsistency between the 'first and second resolutions' in Spencer's Case, the courts have of late been trying to break away from the old rule that the use of the word 'assigns' is necessary to give the covenant the effect of one running with the land, by declaring that the intention of the parties as gathered from the entire instrument is

the controlling factor, rather than the mere inclusion or omission of the technical words. The authorities are as yet fairly evenly divided, however, and in Texas the court, although viewing the new tendency with favor, has felt itself bound by earlier decisions settling the question in favor of the rule as announced in Spencer's Case. For example, if the covenant be to set up and erect a new house, and the like, it will not, under the rule in Spencer's case, supra, bind the assignee unless they are named in the covenant. Similarly, a covenant by a vendor to furnish sewerage, water, electric lights and free transportation has been declared not to run with the land, it being manifest that it was not intended to confer any benefit upon the grantor and that it does not relate to a thing in esse."

In *G. C. & S. F. Ry. Co.* v. *Smith*, 72 Tex. 122, 9 S. W. 865, a vendee of certain land adjoining the Railway Company's right-of-way sought to enforce a stipulation in the deed from his remote grantor to the Railway Company to the effect that, under certain conditions the Railway Company should keep its right-of-way under fence. Holding that the covenant did not run with the land, the court said:

"There has been much discussion in the cases turning upon this point, 'concerning express covenants and covenants in law; and which covenants run with the land, and which of them are collateral, and do not go with the land; and where the assignee shall be bound without naming him, and where not'. In Spencer's Case, 3 Coke, 31, which is recognized as the leading authority upon this subject, the rule is said to be that, when the covenant extends to a thing in esse, part of the demise, the thing to be done by force of the covenant is annexed and appurtenant to the thing demised, and shall go with the land, and bind the assignee, though he be not bound by express words; but, when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which has no being.' If

the covenant be to erect or set up a new house and the like, it will not bind the assignees unless they be named in the covenant. Tallman *v.* Coffin, 4 N. Y. 136; Trustees *v.* Cowen, 4 Paige, 510; Barrow *v.* Richard, 8 Paige, 351. Those covenants which are held to run with the land, and inure to the benefit of the assignee, are such as generally affected the land itself, and conferred a benefit on the grantor. In the case before us, the rule announced in the authorities cited above would apply with additional force from the fact that it appears from the language of the contract or covenant that it was intended to protect stock from injury by the railroad, rather than confer a benefit upon the grantor, affecting the land itself. It was contingent, and necessarily temporary in its application. To construe this contract as a covenant running with the land, and the breach of which would authorize the action in this case, would be an extension of the rule beyond the limits already clearly established in the cases cited."

In *Lakewood Heights Company* v. *McCuistion*, 226 S. W. 1109, the court, following *Railway Company* v. *Smith*, *supra*, held that a contract to furnish sewerage, water, electric lights and free transportation to a car line in the City of Dallas collateral to a contract of purchase and sale of a lot, was a personal covenant and one that did not run with the land.

The court points out that while there seems to be quite a contrariety of opinion as to whether or not a covenant concerning a thing not in esse at the time of the demise runs with the land without the use of the word "assigns", the Supreme Court of Texas has settled the law of this State in harmony with the rule announced in Spencer's case that in such a situation the covenant is personal and does not run with the land. Here the thing was not in esse at the time of the letter agreement and the covenant, if it rises to the dignity of a covenant, does not purport to run in favor of an assignee, or bind an assignee.

Montgomery et al. v. *Craeger* (Tex. Civ. App.), 22 S. W. (2d) 463, is in our opinion directly in point. Montgomery and Craeger were partners in the business of buying and selling gasoline, motor oil and automobile accessories at Mineral Wells, Texas. The partnership was dissolved. Craeger conveyed to Montgomery what was known as the Park Filling Station, and Montgomery agreed to purchase all gasoline sold by him at said station from Craeger. Montgomery sold the filling station to W. A. Ford while the contract between Montgomery and Craeger was in force, and Craeger filed suit against Montgomery and Ford to enjoin a breach of the contract and to recover lost profits. In the District Court final judgment was rendered enjoining any further breach of the contract and awarding to Craeger damages for lost profits amounting to $630.00. Reversing the judgment in so far as it granted plaintiff any relief against Ford, the assignee of Montgomery, the court said:

> "In the case at bar we construe the contract to declare an unrestricted right on the part of Montgomery to sell filling station, save only in the sense that there may be a restriction in the obligation of Montgomery to impose upon the purchaser the obligations of the contract. Having sold to Ford, without obligating Ford to carry out the contract, a case is presented of a breach of contract by Montgomery only."

With respect to the equitable relief sought, the Court held as follows:

> "It is true that equity recognizes a kind of covenants which do not run with the land, but are nevertheless binding upon subsequent owners of property who acquire same with notice. Pomeroy's Equity, Sections 1295, 698. But even that kind of covenant 'must * * * relate to or concern the land or its use or enjoyment. *It is not enough that (such) a covenant affects the use of land or the enjoyment of an easement therein* * * *

in a collateral way.' Kettle River Ry. Co. *v.* Eastern Ry. Co., 41 Minn. 461, 43 N. W. 469, 475, 6 L. R. A. 111; West Virginia Transp. Co. *v.* Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527. In the first case it was held that an agreement by a landowner that the products of the land be transported exclusively by one company does not so relate to the land as to be binding on purchaser with notice. Such we think is the nature of the agreement we are now considering."

In the instant case the Circuit Court of Appeals indicates that the contractual provision under consideration may impose an "equitable servitude" upon the leases in question. It is significant, however, that they granted no equitable relief to the plaintiffs nor treated plaintiffs' suit otherwise than an action for damage. There are probably two reasons for such action. First, the contractual provision is too indefinite and uncertain to support a decree of specific performance by injunction or otherwise. The specific enforcement of the contract would place upon the Court the duty of making a contract for the parties and agreeing for them upon terms not covered by the contract they made. In the second place, the plaintiff suggested no basis for the interposition of a court of equity. They expended nothing on faith of the provision.

The law in Texas, as elsewhere, is that in a proper case the court may impose an equitable servitude upon property where the covenant *directly* affects the property, but in such cases the relief is equitable by way of specific performance or injunction, and not damages. In the recent case of *Everett Factories & Terminal Corp.* v. *Oldetyme Distillers Corp.*, 15 N. E. (2d) 829, the Supreme Court of Massachusetts said:

"Moreover, even if, as in the usual case of a restrictive servitude, the defendant could be enjoined from using the premises in a manner inconsistent with the

> equitable servitude, that is without making the stipulated payments, the amount of such payments cannot be recovered from the defendant personally as damages for use of the premises in such inconsistent manner. Compare Whitney *v.* Union Railway Co., 11 Gray, 359, 71 Am. Dec. 715; Childs *v.* Boston & Maine Ry., 213 Mass. 91, 95, 99 N. E. 957, 48 L. R. A. (N. S.) 378. *The obligation resting upon the land cannot be transformed into a personal obligation of the defendant in either of these ways.*"

Suppose the Court in this case would undertake to enforce the stipulation in question by a decree to that effect or by injunction. What conditions or terms would they impose? Of course, in a proper case, a court of equity may impose an "equitable servitude" upon property,—but may not award damages.

Graham v. *Omar Gasoline Company*, 253 S. W. 896, is a Texas case where equitable relief was held to be proper. Omar Gasoline Company and the Sioux Oil & Refining Company entered into a contract by which the Gasoline Company agreed to buy and the Refining Company agreed to sell all casinghead gas and other gas produced from wells upon a tract of land particularly described in the contract. It was alleged that in performance of said contract the Gasoline Company had entered upon the land and at great expense had installed gas lines and meters for the purpose of taking and receiving the gas; that the contract of purchase and sale was of record when Graham bought the lease and was binding on him. The contract was definite and certain in its terms, vested an interest in the lease and was in all respects susceptible of specific performance. The Court held that it was a case appropriate for equitable relief.

In the instant case the contract is unilateral, is indefinite and uncertain and it is not contended that plaintiffs have

expended five cents in its performance. For the drilling of the original test well, plaintiffs were paid $3,000 cash and received an assignment of an undivided one-fourth interest in an oil and gas lease covering approximately a section of land upon which some twenty-five producing wells had been drilled prior to the date of the trial. From these wells they had received approximately $10,000 to the date of the trial. (R. 207).

American Refining Company et al. v. *Tide Water Oil* Corp., 264 S. W. 335, is another Texas case where equitable relief was granted. There was a contract entered into under which the lease owner agreed to sell and the Oil Company agreed to buy all casinghead gas produced upon a tract of land in the contract described. It was alleged that upon faith of the contract, properties had been constructed at an expense of $1,500,000. The contract was definite and certain and the conclusion of the court was that the purchaser acquired ownership not only of the gas as it might naturally arise and be caught in the casingheads, but also to all the gas *in place*. Under the circumstances and in view of the superior equities of the plaintiff, the court held that equitable relief should be granted.

The same rule obtains in the Federal Court. *Southwest Pipe Line Co.* v. *Empire Natural Gas Co.*, 8 Cir., 33 F. (2d) 248, is similar to and cites the two Texas cases just discussed. There the lease owner agreed to sell and the Gas Company agreed to purchase all the merchantable gas produced from wells then existing or which might thereafter be drilled upon a definitely described tract of land. On the faith of the contract and to take and handle the gas, and to create a market therefor, the purchaser spent $160,000 on pipe lines and other equipment. The lease was sold and the purchaser proposed to disconnect the Gas Company's lines and sell the gas to another. The Court held that the contract gave the purchaser a vested interest in the leasehold estate

not only binding on the lessee, but his assignee as well; that the equities of the case were with the plaintiff and that the relief prayed should be granted.

Joy v. *City of St. Louis*, 138 U. S. 1, illustrates the point from another angle—the interest of the public in the contract. In the Joy case the controversy involved a contract for the joint use of railroad tracks through Forest Park into the Union Station at St. Louis. The franchise granting the right to operate through the park provided that other railroad companies would be permitted to use the tracks. We quote from this case:

> "This is to be done 'under such reasonable regulations and terms as may be agreed upon', and 'upon such terms and for such fair and equitable compensation to be paid' to the County Company 'therefor as may be agreed upon by such companies' ".

With reference to the contract in question, the Court said:

> "The covenant in paragraph 9 of the tripartite agreement created an easement in the property of the County Company and the Kansas City Company for the benefit of the public, which might be availed of, with the consent of the public authorities, properly expressed, by other railroad companies which might wish to use not only the right of way through the park but also that between the park and the Union Depot.
>
> * * * * * * *
>
> "Contracts of such character are to be construed liberally in favor of the public when the subject matter concerns the interests of the public."

The assignee of the original holder of the franchise and a new railway company got at loggerhead over the use of the tracks through the park and could not or would not agree

upon compensation for the use. The Supreme Court held that the privilege accorded to other railway companies to use the trackage was a covenant that ran with the franchise and that the Court, to prevent useless railroad tracks through the park and along the streets of the city, and in keeping with the purpose and spirit of the agreement, would specifically enforce the contract and "fix a fair and equitable" consideration for the use of the tracks and facilities involved.

The public has no interest in the contract involved here.

Argument in Support of Points K and L.

Plaintiff pleaded that the effect of the lease sued on was to create a mining partnership. While the District Judge, in his findings and conclusions, emphasized the existence of a partnership relation, he apparently ignored that relationship in his determination of the case. If the letter in question created a mining partnership and if the provision therein contained in reference to the drilling of future wells is legal and binding, any obligation flowing from such provision would be a partnership obligation and not that of one or more of the partners. In no event is there a basis for the character of suit that is being here prosecuted or the judgment rendered.

In the note appended to *Martin* v. *McBryde*, 21 A. L. R. 12, at page 34, the annotator said:

> "The almost, if not universally accepted general rule is to the effect that, in the absence of statutory permission, or express promise, or fraud, an action ex contractu at law, as distinguished from an action in equity, is not maintainable between partners with respect to partnership transactions, unless there has been an accounting or settlement of the partnership affairs."

The statement is supported by numerous citations, State and Federal, including cases from Texas.

In *47 Corpus Juris*, page 804, the author, discussing the rule and pointing out the anomalous situation that would exist if one partner were permitted to sue another partner at law on a *partnership obligation*, said:

> "In partnership transactions a partner does not as a rule become the creditor of the debtor of a copartner, but of the firm. Such a suit would necessitate that the party complained of be both plaintiff and defendant."

In *Crow* v. *Green*, 111 Pa. 637, 5 Atl. 23, where the alleged breach was of a contract to purchase certain property from the plaintiff partner, the court said:

> "The contract was for the purchase of property to be used for the purpose of the company or partnership. The business to be carried on upon the premises was a joint or partnership business. Upon the theory of a partnership the plaintiff was certainly liable to contribute in proportion to the extent of his interest, to whatever funds were required for the uses of the partnership. If the firm owed debts, we know of no reason why he should not ratably contribute to their liquidation. On the other hand, if they realized profits, it is equally certain he would be entitled to his proportionate share. The theory upon which the action is based is that there was an actual partnership in legal effect, and without that theory, of course, there could be no recovery. But if there was a partnership, we find nothing in this record to show that the ordinary law of partnership is inapplicable to the relations of these parties to each other. The obligation to share losses as well as gains, to contribute jointly with the others to the funds requisite to meet the liabilities of the partnership, is one of the most important and fundamental duties of the relation. This being so, we cannot understand why, if a recovery is had in this action, the plaintiff should not be required to contribute to the payment of the money recovered * * * Suppose, then, a right of recovery be conceded in this case, for what amount shall the verdict be rendered?

If for the whole amount of the contract price, most certainly the defendants could file a bill against the plaintiff to compel him to contribute his proportion. But why should these defendants, who are a part only of the members of the partnership, pay to the plaintiff, who is also a member, the whole of a debt for the payment of which he is jointly liable with them? Such a result would certainly be inequitable, and contrary to every principle and precedent in the law of partnership. If, on the other hand, the verdict should be rendered only for such proportions of the whole amount of the purchase money as the defendants ought to pay, what is the amount of that proportion? That, of course, would depend upon the adjustment of partnership accounts * * * There never was a contract by which these particular defendants agreed to pay to this particular plaintiff any sum of money whatever, for any purpose. Their liability as individuals to make any such payment is a derivative liability, resulting from a joint relation with the plaintiff, which imposes the same liability upon him. It is not necessary to enlarge upon this subject. The case comes within the perfectly familiar rule that one partner cannot sue another partner for a partnership transaction except by bill in equity or action of account render."

While the new Rules for Civil Procedure provide for one court, with jurisdiction at law and in equity, they do not abolish the distinction between law and equity. In Texas we have had the blended system from time immemorial, but the Texas courts have adhered to the rule universally recognized in suits of this character. See cases cited in 121 S. W. (2d) 384.

Hardee v. *Adams Oil Assn.*, 254 S. W. 602 (T. C. A.), is directly in point. Denying the right of one partner to prosecute a suit at law against his copartners, the court said:

"If the declaration of trust had contained no provision exempting the shareholders from personal liabil-

ity for the debts of the association, appellant being a member of the association, it seems to be settled that she could not maintain a suit against her copartners or comembers of the association on a cause of action growing out of a partnership transaction until there had been an accounting and settlement of the partnership affairs.

"In Wrighton on Unincorporated Associations at pages 102, 103, it is said:

" 'One member cannot sue another member on a firm transaction at law unless there has been an accounting fixing the amount due, or the transaction has otherwise been severed from the mutual obligation of the members.'

"In Cyc., Vol. 23, p. 472, the rule is set out as follows:

" 'While an action at law cannot be maintained by one member of a joint-stock association against other members of the same association in respect to their mutual rights and liabilities as such members, yet he may betake himself to a co-ordinate forum and file a bill in equity for the adjustment of their rights and have an accounting if justice requires it.'

"This rule has been recognized and followed by the courts of this state: Merriwether *v.* Hardeman, 51 Tex. 436; Lockhart *v.* Lytle, 47 Tex. 453; Worley *v.* Smith, 26 Tex. Civ. App. 270, 63 S. W. 903.

"In the following cases this rule as to partnership and joint-stock companies is held to be identical: Laney *v.* Fickel, 83 Mo. App. 60; Whitehouse *v.* Sprague (Me.), 7 Atl. 17."

The *Hardee* case was cited with approval and followed in *Brodage* v. *Greenwood*, 261 S. W. 453 (Tex. Com. App.), where a state of facts very similar to the facts of this case was involved. Brodage drilled a well for a syndicate—a partnership—of which he was a member. He sued his copartners for the contract price of the well. Holding that

he could not maintain such suit on a partnership obligation, the court said:

> "If Brodage had an interest in the lease and the contract was as appellees contend, then the appellant could not recover anything in this suit, even though he and Ard and the 'crowd' to whom the amount due on the drilling contract should be credited were not indebted to the Logan Syndicate for the full amount that they would be entitled to for the drilling; in such case, the plaintiff would have a claim against the partnership for such balance, which he could assert *only in accounting* to the partnership. Hardee *v.* Adams Oil Association (Tex. Civ. App.), 254 S. W. 605."

There is an added reason why a suit for accounting was the only available remedy in the instant case. Here the proof shows that during the time with the capital and equipment plaintiffs would have used on the Dorr lease, they engaged in other drilling operations for which they were compensated either in cash or by an interest in a lease (R. 185-190). It was their duty to minimize their damage and account for any profits made by them during the time they would have been engaged upon the Dorr lease. An accounting suit was the only proper proceeding for an adjustment of the rights of the parties.

Plaintiff Buffington testified that subsequent to the alleged breach of contract in question, and during the period he and his partner Smith would have been engaged in drilling wells on the Dorr lease, they drilled wells on other property. The first well was drilled in Scurry County (R. 185). They were interested in drilling the Emory Well in Ward County, for which they received a three-eighths interest in the lease on one tract consisting of eighty acres, and two other tracts consisting of forty acres each. The Emory well was a producer (R. 186-187). They drilled two wells on what is known as the Samuels property, one of

which wells was junked, but the second well was completed (R. 187-189). They took over and completed another well known as Archenhold No. 1, completed in August, 1939 (R. 189-190).

Defendants' counsel endeavored to show by plaintiff Buffington what profits were made by him and Smith on these operations, but was not able to elicit the proof, though the facts were peculiarly within their knowledge.

It appearing that the plaintiffs utilized their time, capital and equipment in other work, and that the information with respect to profits, if any, derived therefrom was peculiarly within the knowledge of plaintiffs, the burden rested upon them to make disclosure of the facts in order that appropriate credit might be allowed therefor in their claim for damages in this suit.

Ordinarily the burden rests upon the defendant to prove that the plaintiff might, by the use of reasonable diligence, have minimized the damage and the extent to which he might have done so. That rule does not apply, however, where the facts are peculiarly within the knowledge of the plaintiff.

> "It is a principle of law, when a particular fact necessary to be proved rests peculiarly within the knowledge of one of the parties, upon him rests the burden of proof." *Anthony* v. *American Railway Express Company*, 124 S. E. 753.

This rule has found favor in the Federal Courts. *Railway Co.* v. *United States*, 139 U. S. 560; *United States* v. *D. & R. G. R. Co.*, 191 U. S. 84.

The rules applies with peculiar force here. Plaintiffs allege that they and the defendants were and are partners. That relationship required of plaintiffs the utmost frankness and candor. It required that they disclose the profits made by them by the use of time, money and equipment

which they admit would have been necessary to carry on a drilling campaign on the Dorr lease. If they would have made money by the drilling of the wells on the Dorr lease, it is a reasonable assumption that they made profits out of the drilling done by them on other leases. They admit that by such drilling they acquired a three-eighths interest in a producing lease in Ward County. It is not inconceivable this profit may exceed the loss which they claim to have sustained on account of their failure to drill wells on the Dorr lease. In such a situation they have failed to prove their case. *Barron G. Collier, Inc.* v. *Peters Bros., Inc.* (*Tex. Civ. App.*), 124 S. W. (2d) 904; *Mount Ida School for Girls, Inc.* v. *Rood*, 253 Mich. 482, 235 N. W. 227, and *Russman* v. *Blount*, 104 F. (2d) 877.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

NO. 771

BRITISH-AMERICAN OIL PRODUCING COMPANY, *Petitioner*,

vs.

D. M. BUFFINGTON AND C. R. SMITH, *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1940

NO. 771

BRITISH AMERICAN OIL PRODUCING COMPANY, *Petitioner*,

vs.

D. M. BUFFINGTON AND C. R. SMITH, *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Writ of certorari to review the above cause should be denied, and in opposition to the petition for such writ, respondents, D. M. Buffington and C. R. Smith, submit the following:

OPINION OF THE COURT BELOW

The opinion rendered by the 5th Circuit on December 19, 1940, is reported in 116 F (2d) 363. The opinion of the District Court, which was affirmed by the Circuit Court, is not reported.

SUPPLEMENTAL STATEMENT OF THE CASE

J. J. Dorr, as the owner of Oil and Gas Leases covering a section of land in Ward County, Texas, entered into a contract with D. M. Buffington and C. R. Smith (R. 3-5), whereby Buffington and Smith, in return for drilling a test well on said land for oil and gas, and as consideration thereof, were to receive from Dorr certain cash payments, together with an undivided one-fourth interest in the leasehold estate, and if the test well was a producer, were to have the preference right to do all future drilling operations at the prevailing contract price, the provision in said agreement on which this suit is predicated being as follows:

> **"It is further understood and agreed that in the event said well is a producer, we are to have the preference of all future drilling operations, at the prevailing contract price."**

Buffington and Smith, respondents herein, drilled the test well, which was a producer, and received by assignment from Dorr, a one-fourth interest in the leasehold estate. Thereafter, they conveyed a one-eighth interest in the leasehold estate to A. J. Gibson and Richard Hamm, each of whom received a one-sixteenth interest. In these assignments, Buffington and Smith expressly reserved to themselves the drilling rights given them in their contract with Dorr. Buffington and Smith thereafter drilled for themselves, Hamm, Gibson and Dorr, four more wells on said land, same being drilled by Buffington and Smith with cable tools at a price of $2.50 per foot. Hamm, Gibson and Dorr then assigned their interest to

British-American Oil Producing Company, so that said company became vested with a seven-eighths interest in the leasehold estate, Buffington and Smith retaining their one-eighth interest therein.

It is undisputed that British-American Oil Producing Company bought its seven-eighths interest with notice, both actual and constructive, of the aforesaid quoted provision in the contract, and with notice and knowledge that Buffington and Smith had drilled the five wells located on said land. Said company, without further ado, and over Buffington and Smith's objections, assumed the complete operation of the leasehold estate, and while said company at one time wired Buffington and Smith to submit a bid covering the drilling of Well No. 6 with rotary equipment (R. 157), said company's General Superintendent of Production acknowledged that the company never offered to let Buffington and Smith do the drilling at the prevailing contract price (R. 301). The company let a contract to McCutcheon Drilling Company for the drilling of five wells, said drilling company being the only bidder, and a former contractor for British-American Oil Producing Company, (R. 305, 306). British-American Oil Company, through said contractor, then drilled, during the pendency of this suit, twenty wells on said land, eighteen of the wells being drilled after Buffington and Smith filed suit in the District Court seeking enforcement of the contract and damages for breach thereof by the company.

The case was considered to be, and tried, as an equity case, but the court granted Buffington and

Smith's request for an advisory jury, and the jury, in answer to special issues submitted, found that there existed a prevalent, general, customary, recognized price in the area in question then paid per foot for the drilling of oil wells at the time the twenty wells were drilled, that such price was $2.50 per foot, that Buffington and Smith would have made a profit of $1,250.00 per well, or a total profit of $25,000.00 if they had drilled the twenty wells in question at such price (R. 74-75). The District Judge took the case under advisement, and after written briefs were submitted by the parties, entered judgment in favor of Buffington and Smith for $25,000.00 without prejudice to their right to assert a claim for damages on any additional wells drilled on said land by British American Oil Producing Company and rendered judgment in favor of said company on its cross-action against Buffington and Smith for $25,382.46, being one-eighth of the total sum he found British-American Oil Producing Company had expended on said lease, and offset one judgment against the other (R. 91-96). With the judgment, the court filed findings of fact and conclusions of law (R. 76-91). The court found, among other conclusions of law, that the contract with Dorr was a lawful one, that the provision giving Buffington and Smith the preference right to do all future drilling at the prevailing contract price was a part of the consideration given by Dorr to them for their agreement to drill the test well, that the provision was sufficiently certain and definite to support the cause of action, that if it was indefinite in any particular, it was rendered certain and definite on the trial of the cause, that it was not breached by

Buffington and Smith, that British-American Oil Producing Company took subject thereto and was bound thereby, that a mining partnership was in existence at the time said company purchased its interest in said lease, and that the provision sued on, if not a covenant running with the lease, was a profit a prendre, or equitable servitude and that British American-Oil Producing Company breached said provision to the damage of Buffington and Smith, the measure of damages being the loss of profits they would have made in the drilling of the wells.

British-American Oil Producing Company and Dorr moved for a directed verdict, moved to set aside the verdict of the jury and moved the court to render judgment for them. Motions were overruled and judgment was entered as aforesaid.

On appeal the United States Circuit Court of Appeals for the 5th Circuit (Justice Hutchison dissenting) affirmed, on December 19, 1940, in an opinion by Justice McCord, the judgment of the trial court, but eliminated the damages allowed as lost profits on the first of the twenty wells drilled by British-American Oil Producing Company, in the sum of $1,093.75, on the theory that Buffington and Smith were not in position to drill the first well, but were ready, able and willing to drill the other nineteen wells and reduced the balance of the recovery in favor of Buffington and Smith by one-eighth, on the ground that they would have been liable for their proportionate one-eighth of the drilling costs, thereby diminishing the judgment in favor of Buffington and Smith from $25,000.00 to $20,781.25,

which judgment was offset against that of British-American Oil Producing Company on its cross-action for $25,382.46, leaving judgment in favor of British-American Oil Producing Company for $4,601.21, instead of $382.46. Dorr was released from liability.

British-American Oil Producing Company filed a petition for re-hearing in the Circuit Court of Appeals on January 8, 1941, which was overruled on January 14, 1941. Said company then filed its application to this Honorable Court for writ of certiorari, and served Buffington and Smith with notice thereof.

NO BASIS FOR INVOKING JURISDICTION OF THE SUPREME COURT

As reasons relied on for the allowance of the writ, petitioner lists in its petition for writ of certiorari, twelve reasons, numbered, or designated, alphabetically from A to L, inclusive. In each instance it is recited that the decision of the Circuit Court of Appeals in this case, in some particular therein set out, is a decision of an important question of local law which is in conflict with local decisions, or with decisions of other Circuit Courts of Appeals, or with "applicable local and other decisions," or that the decision is an erroneous decision of an important question of local law, or that same is an erroneous decision of an important question of general law. In most instances, cases are cited without comment, but evidently with the purpose in mind of supporting the theory that the decision in the instant case

is in conflict with local decisions or with decisions of other Circuit Courts of Appeals.

In petitioner's brief, some, but not all, of these cases are discussed under alphabetical headings conforming to the alphabetical listing in the petition for the writ, the subject matter of such headings in the brief being substantially the same as the subject matter thereof in the petition.

It is apparent that the principal theory advanced by petitioner to sustain the jurisdiction of this Honorable Court is the theory that the decision in the instant case, as rendered by the 5th Circuit Court of Appeals, is in some particulars a decision of an important question of local law which is in conflict with local decisions, it evidently being petitioner's purpose to attempt to invoke the jurisdiction of this Honorable Court under the provisions of Rule 38, Subsection (b) of sub-section 5. Yet, in few, if any, instances in petitioner's brief, do we find even any attempt to show the existence of an actual conflict between the decision in this case and the decision of Texas cases, or any other cases. In this case, as well as in cases of like nature, the decision must ultimately rest on the facts and circumstances of the case, and as an example of what we are talking about, we point out that, while petitioner has cited a number of cases under Section A of its reasons for allowance of the writ, in an effort (to show that the decision of the Circuit Court of Appeals to the effect that the contractual provision upon which respondents predicate their case, is not too incomplete, indefinite and uncertain in its terms to support the

judgment rendered), is an erroneous decision of an important question of local law and conflicts with local applicable decisions, yet none of the cases so cited relate to the subject matter at hand, and all are but evidence that each case, as to certainty of the contractual provision, or otherwise, must stand or fall upon its own particular fact situation.

We shall hereinafter list in alphabetical order, corresponding with the order in petitioner's brief, points, or summaries of argument controverting those in petitioner's brief, and will endeavor, in our argument in support of such points to not only answer the argument of petitioner, but to show that none of the Texas or Federal cases cited by petitioner conflict in any way with the decision of the 5th Circuit Court of Appeals in this case, and to show that petitioner has failed to establish any ground sufficient to invoke, support or sustain the jurisdiction of this Honorable Court.

ARGUMENT

SUMMARY OF ARGUMENT

Point A.

The words giving respondents the preference right to drill are plain, and necessarily relate only to the leases which were the subject matter of the contract, and the term "prevailing contract price" simply means the price generally paid in the area, the prevalent, general, customary, recognized price, and necessarily could refer only to the area in which such leases were located. The phrase "prevailing contract price" having a definite meaning, the covenant fixed such price as the price to be paid, and if the parties were not able to agree as to what the prevailing contract price in the area was, it was subject to proof on the trial of the cause, and was proved by the testimony of respondents' witnesses, who testified as expert drilling contractors with reference thereto (R. 213, et seq.) (R. 223, 224, et seq). British-American Oil Producing Company offered no testimony to controvert such evidence as to the existence of a prevailing contract price, but merely tried to show the prices quoted were either competitive prices, or prices paid to favored contractors (R. 232). Whether one or the other, however, or both, the prevalent, general, recognized, customary price paid in the area would be the prevailing contract price.

Point B.

In fixing the price to be paid, respondents for the drilling of the wells on said land by giving them the

preference right to do such drilling "at the prevailing contract price," the contract fixed, or furnished a key for the determination thereof. If the parties were unable to agree as to the prevailing contract price, the same could be, and was, determined by proper evidence as to the existence and amount thereof. That the contract is not full and complete as to details is no reason to strike it down, but the same will be sustained if the meaning of the parties can be determined under the rule that that is certain which can be made certain. *Elliott on Contracts*, Volume 1, Page 8; *Dale Oil Refining Company v. City of Tulsa*, 25 S. W. (2d) 671 (Texas); *Bulger v. Ray*, 239 S. W. 259 (Texas); *Memphis Furniture Manufacturing Company v. Wemyes Furniture Company*, 2 Fed. (2d) 428 (6th CCA); *F. S. Royster Guano Company v. Hill*, 68 Fed. (2d) 533 (4th CCA); *Southwest Pipeline Company v. Empire Natural Gas Company*, 33 Fed. (2d) 248 (8th CCA).

Point C.

The following wire or telegram from British-American Oil Producing Company to Buffington and Smith, to-wit:

> "WE PLAN TO DRILL REMAINDER OF WELLS ON OUR RECENTLY PURCHASED PAYTON LEASE IN PECOS COUNTY USING PORTABLE ROTARY OUTFIT STOP PLEASE SUBMIT YOUR BID IMMEDIATELY COVERING THE DRILLING OF THESE WELLS WITH THIS TYPE EQUIPMENT";

was not a tender of the drilling at the prevailing contract price but was a request for bids. Buffington

and Smith were not required to bid competively for the right to do the future drilling at the prevailing contract price, this right having been obtained in their agreement with Dorr.

Point D.

Buffington and Smith's telegraphed reply to the aforesaid telegraphed request for bids from the British-American Oil Producing Company to them, said reply telegram reading as follows:

> "OUR DRILLING AGREEMENT DOES NOT REQUIRE US TO USE PORTABLE ROTARY MACHINE STOP WE ARE READY TO BEGIN THE DRILLING OF A WELL ON SUITABLE LOCATION ON OUR LEASE AT PREVAILING PRICE IN ACCORDANCE WITH OUR CONTRACT";

was not a breach of the covenant sued on, as the telegram to them from British-American Oil Producing Company was not an offer to permit them to do the drilling at the prevailing contract price, but was only a request for bids. Even, however, if it could be argued that the telegram from British-American was an offer to Buffington and Smith, Buffington and Smith's telegraphed reply thereto was not a breach of the covenant sued on but only a refusal to bid for such right, and only questioned the right of British-American to require the use of a rotary machine. Same was squarely within the principles of law set out in 10 *Texas Jurisprudence*, Section 266, page 495, as follows:

> "* * * a contention or controversy over the terms of a contract or the construction to be placed upon

it and a refusal to perform in a particular manner or in some specific feature by one of the parties, is not such a renunciation or abandonment as will authorize the other party to treat the contract as rescinded or breached * * *".

Point E.

Necessarily the prevailing contract price was based upon the price paid favored contractors in the area, as well as the price paid contractors competitively bidding for the work. Testimony from both favored contractors and contractors bidding on a competitive basis was introduced by Buffington and Smith in the trial of the case (R. 213, 223, 224.), and from this testimony the jury and the court determined the prevailing contract price.

Point F.

Under the contract sued on, Buffington and Smith were given the right to do all future drilling at the prevailing contract price; having this right, the fact that they could make a profit on doing this drilling at the prevailing contract price violates in no way the general principle of law that one partner cannot profit in the performance of business on behalf of his associates.

Point G.

British-American Oil Producing Company, having purchased its interest with notice and knowledge of the contract and the operations thereunder, took subject thereto and is bound thereby, a mining partnership then being in existence.

Point H.

A provision in the contract giving Buffington and Smith the preference right to do all future drilling was a covenant running with the leases to which same related, and not a personal covenant, and said company, having acquired its interest in such leases with knowledge and notice thereof, took subject thereto and is bound thereby. *Summers on Oil and Gas*, Section 553, p. 303; *American Refining Company v. Tidal Western Oil Corporation*, 264 S. W. 335 (Error refused by Texas Supreme Court.).

Point I.

The provision in the contract sued on, if not a covenant running with the leases, is at least a profit a prendre or equitable servitude which attaches to the leases, and British-American Oil Producing Company, having bought with notice and knowledge thereof, should be and is bound thereby. *Anderson v. Rowland*, 44 S. W. 911 (Texas); *Graham v. Omar Gasoline Company*, 253 S. W. 896 (Texas); *Southwest Pipe Line Company v. Empire Natural Gas Company*, 33 Fed. (2d) 248; *Sims v. Southern Pipe Line Company*, 195 S. W. 283 (Error refused by Texas Supreme Court); *American Refining Company v. Tidal Western Oil Corporation*, 264 S. W. 335 (Error refused by Texas Supreme Court).

Point J.

An oil and gas lease, through creating a determinable fee estate, is in the nature of a lease and not a deed, and the British-American Oil Producing Company, having

purchased its interest in the leases with notice and knowledge of the contract relating thereto, took subject thereto and is bound thereby. *Pierce Fordyce Oil Association v. Woodrum*, 188 S. W. 243 (Texas).

Point K.

If any partnership was in existence, it was a mining partnership, and under mining partnerships, as distinguished from general partnerships, the rule is that one mining partner may maintain an action against another partner without suing for a dissolution of the mining partnership and without an accounting. *Gilbert v. Fontaine*, 22 Fed. (2d) 657; *Indiohoma Refining Company v. Wood*, 255 S. W. 212 (Texas); *Moss and Urchell v. Clark*, 82 S. W. (2d) 1090 (Texas); *Greene v. Condor Petroleum Company, et al.*, 140 S. W. (2d) 844.

Point L.

There was no necessity for Buffington and Smith to make any disclosure of, or to account for, the profits derived by them from their drilling operations. Drilling contractors ordinarily have a number of drilling contracts on hand at one time and usually are engaged in drilling, at one time, a number of wells, so that the breach of one of such drilling contracts by one owner would not require the drilling contractor to offset his damages sustained by such breach with profits obtained in the drilling by him of the other wells under his other contracts.

Even should the rule that damages must be minimized by obtaining other work be applicable to the

breach of drilling contracts, the burden was on British-American Oil Producing Company to show the amount by which damages should be diminished and this it failed to do.

ARGUMENT IN SUPPORT OF POINTS A and B

While petitioner lists a great many cases in its petition under its Points A and B, it quotes in its brief under such points only one case. Nevertheless, in an effort to show that none of these cases cited by petitioner conflict with the decision in the instant case as rendered by the Circuit Court of Appeals, we wish to discuss briefly each Texas and Federal case cited by petitioner:

The first Federal case, that of *Winn et al. v. McCarthy, et al.*, 97 Fed. (2d) 964, involved the enforcement of a contract by a buyer to purchase goods from the seller, some of which were to be bought on buyer's personal account, and some on a consignment account. The court refused to enforce the contract because, under the contract, the buyer was to designate into which class the goods purchased would fall, but never made such classification. It is interesting, in this connection, however, to note that the agreement provided for the payment of such goods at *prevailing* factory prices. No point was made that this phrase was indefinite in any particular, and the special master in the case ascertained and set out such prevailing factory prices, and reported same to the trial court.

The case of *American Life Marine Insurance Company v. Letton*, 9 Fed. (2d) 799, involved simply an agreement for employment, which was based on certain conditions never performed.

The case of *Jordan, et al. v. Buick Motor Company, et al.*, 75 Fed. (2d) 447, involved an agreement for an exclusive sales agency of the Buick products. The agreement was correctly stricken because it involved no details whatsoever, and in view of the ordinary complications arising under a sales agency contract and the unusual nature thereof, it was held the simple agreement for exclusive sales agency without any further particulars was too indefinite for enforcement.

In the case of *Spivy et al. v. Saner-Ragley Lumber Co., et al.*, 284 S. W. 210 (Tex. Comm. App.), it was correctly held that a contract giving plaintiff the right to install 75,000 cups on turpentine trees for one year was definite and certain, but that the portion of the contract in which it was provided that the number of cups for the next year were to be agreed upon in the future, was simply an agreement to make a future agreement and not enforceable.

In the case of *Radford v. McNeny, et al.*, 104 S. W. (2d) 472, brokers sued for a commission on a lease contract obtained by them for lessor. Lessor, however, had agreed to sign such a contract and pay them a commission only if the terms were agreeable to him. Clearly, this contract was not enforceable.

In *Canady, et al., v. Martin, et al.*, 98 S.W. (2d) 1009, (Tex. Comm. App.), plaintiff sought to enforce the

agreement of the defendant to erect a brick building. Inasmuch as the agreement provided no specifications whatsoever, but simply recited that the defendant would erect a brick building, the court necessarily held same to be too uncertain for enforcement.

In the case of *Haskell Motor Company v. Remington*, 25 S. W. (2d) 913, (Tex. Comm. App.), one party contracted to do painting in payment of a note. The agreement was held not to be enforceable, because it was too uncertain and varied the terms of a written instrument.

In *Texas Employers' Ins. Assn. v. Moore*, 56 S. W. (2d) 653 (Tex. Comm. App.), defendant wrote plaintiff he had work to offer him providing he could report at once to his foreman. Plaintiff reported but was denied work, and the court held he had no enforceable contract, as he still had to contract for work after reporting to the foreman.

In *Brooks v. Federal Surety Co.*, 24 Fed. (2d) 884, an agreement in which one party agreed to buy coal from another party for such price as he might sell it, less ten per cent, was held to be too indefinite and to lack mutuality, the price not being certain and being entirely within the discretion of one of the parties. By inference, the court indicated that if the agreement had been to purchase same at the market price, less ten per cent, which is a price that could be determined, just as the prevailing contract price can be determined, the same would have been enforceable.

We have discussed each and all of the foregoing cases cited by petitioner to show that none of the de-

cisions in which certain contracts therein construed were held to be too indefinite and uncertain in their terms to support a cause of action, conflict in any way with the decision rendered by the Circuit Court of Appeals in the instant case that the covenant sued on in this case was sufficiently definite and certain to support the judgment rendered. It is very obvious that the question in each instance as to whether the contract was certain, depended upon the nature of the contract itself and the facts surrounding same, and none of the cited cases in any way are applicable to the case at bar.

The provision in the contract sued on in the instant case is sufficiently definite and certain, in that, while it does not fix the location of the wells or the size of the hole, or who is to furnish fuel or water, or which party is to furnish and erect the derrick, it does specifically give to plaintiffs the preference right to drill future wells at the prevailing contract price, which certainly is language readily understood by those engaged in the petroleum industry. As a matter of fact, the details in most drilling contracts are about the same; that is, it is customary for the owner to determine the size of the hole, its location, the casing pattern, etc., and customary for the contractor to furnish the fuel, water, insurance, etc. This is acknowledged impliedly by British-American Oil Producing Company in that their request by telegram to Buffington and Smith for a bid on future drilling operations (R. 157) lacks the very essentials about which the company complains, yet it considered same sufficient to enable Buffington and Smith to furnish a bid thereon.

Even if the contractual provision sued on could be said not to be certain and definite in all its details, such definiteness and certainty may be supplied by evidence under the theory that that is certain which can be made certain. *Elliott on Contracts*, Volume 1, Chapter 8; *Dale Oil Refining Company v. City of Tulsa*, 25 S. W. (2d) 671 (Tex. Civ. App.); *Bulger v. Ray*, 239 S. W. 259 (Tex. Civ. App.).

Evidencing the same rule is the Federal case of *Memphis Furniture Manufacturing Company v. Wemyes Furniture Company*, 2 Fed. (2d) 428 (6th CCA), in which a contract by defendant to purchase from plaintiff some furniture subject to "*prices prevailing* at the time of shipment, and subject to our (plaintiff's) ability to ship," was enforced by the court at the instance of plaintiff, the court holding that the phrase above quoted was one which could be rendered certain by proof as to such prevailing price.

Likewise, in the Federal case of *F. S. Royster Guano Company v. Hill*, 68 Fed. (2d) 533 (4th CCA), defendant's agreement with plaintiff "to give plaintiff employment for life at top wages for common labor" was enforced, the court holding that the phrase was sufficiently definite to be made certain.

Again, in the case of *Southwest Pipeline Company v. Empire Natural Gas Company*, 33 Fed. (2d) 248 (8th CCA), the court, in holding a contract of the plaintiff to purchase gas from the vendor of the defendant "in the usual conduct of its business ratably with other producers in the same field having gas in the same producing horizon or sand, and in accordance with ap-

proved practice in the industry" to be sufficiently definite and certain to support a cause of action, the court said:

> *"A contract need not contain definitely and specifically each fact in detail to which the parties may be agreeing. If the phrase used can be made certain by proof that is sufficient . . . It is couched in language appropriate to the approved practices of the established pipeline business and well understood by those engaged in the oil and gas industry. The phrase, 'in the usual conduct of its business' can be interpreted in the line of evidence as to what that conduct was."*

We also call your attention, in this connection, to *Article 5159A* of the Texas Revised Civil Statutes of the State of Texas, which has been held to be constitutional, and which provides that on public projects "not less than the *general prevailing rate* per diem wages for work of a similar character of the locality in which the work is performed . . . shall be paid to all laborers . . . employed by or on behalf of the State of Texas."

In fact, a provision very similar to the one sued on in the instant case, was sustained as being sufficiently definite and certain in the case of *D. D. Mickleson v. Gypsy Oil Company, et al.*, 238 Pac. 194, an Oklahoma case, in which the right to do all future drilling was upheld.

Certainly, in the instant case, the term, "prevailing contract price" was fixed with certainty and definiteness by the testimony of drilling contractors who were respondents' witnesses. (R. 213, 223, 224).

ARGUMENT IN SUPPORT OF POINTS C and D

Petitioner cites a number of Texas and Federal cases under reason C of its reasons relied on for the allowance of the writ, but in its brief, discusses only one of these cases, namely, that of *Minneapolis and St. Louis Ry. Co. v. Columbus Rolling Mill Co.*, 119 U. S. 149. **Here again, we can find nothing in petitioner's brief, or in its petition, to indicate any conflict between the decision of the Circuit Court of Appeals in the instant case with applicable local and other decisions.** In the above case, defendant offered to sell plaintiff 2000 to 5000 tons of rails at a certain price. Plaintiff replied that it would buy 1200 tons and ordered same. Defendant refused to deliver 1200 tons for the price quoted by it for 2000 to 5000 tons, and the court necessarily held that the plaintiff, having materially varied in its acceptance the offer of the defendant, refused the offer of the defendant, so that no contract was consummated, the defendant not having accepted the counter offer of the plaintiff.

The hereinbefore described wire, or telegram, from British-American Oil Producing Company to respondents asking for a bid for the drilling of a well, was not an offer to permit respondents to do such drilling at the prevailing contract price, but was simply a request for bids. The contract gave respondents the preferential right to do such drilling at the prevailing contract price and they were under no obligation to submit a bid. Consequently, there was no breach by respondents of the covenant giving them such right—either by the telegraphed reply made by them to peti-

tioner (R. 158), or otherwise—for the reason petitioner never gave them an opportunity to perform the preferential right to do such drilling.

Mr. Wright, General Superintendent for British-American Oil Producing Company, admitted that respondents advised him they would do the drilling at the prevailing contract price (R. 301); that his company never offered to let the respondents do such drilling at the prevailing contract price (R. 301); that he never told respondents what he thought the prevailing contract price was (R. 305); that McCutcheon, his company's contractor, who had drilled for the company before (R. 304) was the only contractor from whom his company got a bid (R. 306); that he never told respondents of the bid made by McCutcheon and never asked them if they would do such work for that price (R. 307).

Respondents testified that they advised petitioner they would drill such wells at the prevailing contract price, whatever that price might be determined to be, and when this right was refused them, instituted this suit to enforce the same, the suit having been instituted about the time of the drilling by petitioner of the second well of the twenty wells drilled, and prior to the drilling by petitioner of the last eighteen wells, all of which were drilled by petitioner during the pendency of this suit. (R. 159-160). Respondents further testified that while they might not have been in position to drill the first well with a rotary, they were in position to drill, and would have drilled, the other nineteen wells with rotary (R. 206-207).

Even if it could be said, however, that the telegram from petitioner to respondents (R. 157), was an offer to respondents permitting them to do such drilling at the prevailing contract price, respondents' telegram in reply thereto (R. 158) was not a breach of the right given them under the contract to do such drilling, but simply a refusal to bid for such right—which right they already had without bidding for same—and simply questioned the right of petitioners to require the use of a rotary machine. Clearly, this comes within the rule of law set out in *10 Tex. Jur. Section 266, Page 459*, as follows:

> "* * * a contention or controversy over the terms of a contract or the construction to be placed upon it and a refusal to perform in a particular manner or in some specific feature by one of the parties, is not such a renunciation or abandonment as will authorize the other party to treat the contract as rescinded or breached. * * *"

If said telegraphed reply could be said to be a breach at all—it would have to be an anticipatory breach, we think, and in order to be an anticipatory breach, same must be a definite, unconditional breach. As said in the Texas Supreme Court case of *Moore v. Jenkins*, 211 S. W. 975:

> "But to have this effect (the effect of breaching the contract), the declaration of an intention not to perform the contract in the future must be unconditional in its terms."

The doctrine is further stated in the case of *Universal Life & Accident Co. v. Sanders*, 102 S. W. (2d) 405, a Texas Commission of Appeals case, approving

the early Texas Commission of Appeals case of *Pollack v. Pollack*, 46 S. W. (2d) 292, in which it is said:

> "The Pollack opinion limits its application to cases in which the obligor absolutely repudiates the obligation without just excuse,"

and bear in mind that, at the time of the receipt by respondents from petitioner of the telegram asking for bids with use of rotary equipment, respondents had just successfully completed on the leasehold estate the drilling of five producing wells with cable tool equipment.

Yet, even if we should assume for the sake of argument that the telegraphed reply of respondents did constitute a breach of the covenant sued on, same could relate only to the right of respondents to drill the first of the twenty wells drilled, since the preference to do future drilling at the prevailing contract price was a continuing right, an optional right, and the consideration therefor having been paid by respondents, that is, the test well provided for in the contract with Dorr having been drilled by respondents, they could refuse to drill the first well and still assert the right to drill the next well, or any of the later wells, or all of them, as the doctrine of anticipatory breach does not in fact apply to unilateral contracts, or to bilateral contracts where the injured party has already performed all that the contract required of him. *Williston, on Contracts, Second Edition, Sections 1328 and 1296.*

ARGUMENT IN SUPPORT OF POINT E

Petitioner has discussed, under Point E, in its brief, several cases which we feel logically should have been discussed under Points A and B, and which we have discussed under A and B in this brief, and that discussion is not repeated here. We will say, however, that while of necessity, the prevailing contract price was based upon the prices paid favored contractors in the area, as well as the prices paid contractors competitively bidding for the work in the area, respondents introduced testimony from both favored contractors and contractors bidding on a competitive basis (R. 213, 223, 224) and from this testimony, the jury and the court determined the prevailing contract price. In other words, the evidence admitted included prices based both on a favored contractor basis, as well as prices based on a competitive basis, so that from a consideration of all prices, the prevalent, general, recognized, customary price paid in the area could be, and was determined. Petitioner, in this connection, offered no testimony to controvert such evidence as to the existence of a prevailing contract price.

ARGUMENT IN SUPPORT OF POINT F

While it is true that there exists a general rule of law to the effect that a partner is not entitled to compensation from his co-partners for services in conducting the partnership business, unless there is a stipulation to that effect, we submit that the stipu-

lation, or provision in the contract giving respondents the right to do all future drilling at the prevailing contract price most certainly entitled them to receive such price for such drilling, and the fact that they could make a profit in the performance of the drilling at such price in no way violates the general principal of law above set out. In other words, if they were entitled to do such drilling at the prevailing contract price, they were entitled to any profits, if any, resulting to them under the price which the contract provided should be paid them. This is, in effect, the recent decision of the Texas Commission of Appeals in the case of *Greene v. Condor Petroleum Company, et al,* 140 S. W. (2d) 844, in which it was held that a joint owner of Oil and Gas Leases may accept employment from other owners holding jointly with him to render a personal service for the benefit of their joint holdings, and may enforce such contract, or agreement, against such owners.

ARGUMENT IN SUPPORT OF POINTS G, H, and I

Under Point G, petitioner urges that it has been consistently held in Texas that where one purchases real property burdened with a lien or encumbrance, such purchaser does not become liable therefor in an absence of an assumption of such obligation and petitioner cites, under this point or reason in its petition, several Texas cases. In its brief, however, it does not undertake to argue the point, or the cases cited. *Here again, the petitioner has failed, in our opinion, to indicate any conflict between the decision in the instant case*

and decisions in local cases, for the reason that, while the cases cited by petitioner are authority for the point made with reference to the assumption of liens and encumbrances, they are in no way applicable to the case at bar.

In our case there was in existence at the time petitioner purchased its undivided interest in the leasehold estate, what is termed a mining partnership, and it is most certainly true that one purchasing an interest in a mining partnership takes subject to all of the provisions of the mining partnership, whether the same are assumed or not. While the original letter agreement between respondents and Dorr did not, in itself, create a mining partnership, a mining partnership was provided for therein, which came into being after respondents drilled the test well provided for in the agreement and received by assignment from Dorr an undivided interest in the lease. The wording of the contract with Dorr implies a sharing of profits and losses, a joint operation and mutual agency, a joint sharing of expenses, and in fact refers to the enterprise as a joint venture, which terminology is used interchangeably with mining partnership in decisions relating to mining partnerships. See *Gardner, et al. v. Weisner, et al.*, 55 S. W. (2d) 1104 (error refused by Texas Supreme Court). Such provision in the contract met all the requirements of a mining partnership with the exception of a joint ownership, and this came into being upon the assignment by Dorr to respondents of an interest in the lease. See *Wagner Supply Company v. Bateman*, 18 S. W. (2d) 1952 (Tex. Sup. Ct.); *Shell Petroleum Corporation v. Caudle*, 63 Fed. (2d) 296;

Indiohoma Refining Company v. Wood, 255 S. W. 212 (Tex. Civ. App.); *Gilbert v. Fontaine*, 22 Fed. (2d) 657; *Gardner v. Weisner*, supra; *Sturm v. Ulrich*, 10 Fed. (2d) 9; *Moss and Urchell v. Clark*, 82 S. W. (2d) 1090 (Tex. Civ. App.), in which case it is said:

> "The record discloses, without controversy, that * * * appellants and appellees were co-owners of the lease, the first well already having been drilled and were jointly operating said lease with appellants in full charge of operation of the same. Under these facts, there was created as a matter of law, a mining partnership between appellants and appellees."

Not only did the letter agreement itself create a mining partnership which had its inception when respondents acquired by assignment from Dorr their undivided interest in the lease, but after the drilling of the test well by respondents, the joint action of respondents and Dorr, Gibson and Hamm, the then owners of the lease, in financing same, in sharing the profits thereof, and the expenses thereof, and in agreeing by mutual consent with reference to the location of the first wells drilled by respondents, as well as in agreeing upon the prevailing contract price, so as to determine the price to be paid respondents for drilling such wells, created a mining partnership which was then in existence at the time petitioner purchased its interest in the property, and petitioner having purchased its interest when the mining partnership was in existence, took its interest subject to, and burdened with the provisions of the mining partnership contract aforesaid and is bound thereby, it being pointed out, in this con-

nection, that a mining partnership differs from the usual commercial partnership, in that a mining partnership, once created, continues and is not dissolved by the fact that one of the partners has disposed of his interest to some outside party. Such outside party, in that event, acquires its interest in the mining partnership subject to the obligations and with the profits provided by the mining partnership. This principle of law is established in a number of the decisions above set out, and as an example of the same, we quote from *Sturm v. Ulrich*, supra, as follows:

> "Where a mining partnership is in existence, the purchase of an interest of a partner, or the purchase of an interest of a partner in the lease being mined, makes the purchaser a partner."
>
> "When a mining partnership is once created it continues and is not dissolved by the fact that one of the partners has disposed of his interest to some outside partner. What the defendants bought into when they acquired their interest in the lease in question was an undivided interest in a mining partnership and thereby secured the rights and assumed the obligations which the well established rules governing such partnerships provide."

In support of its Points H and I, to the effect that the Circuit Court of Appeals erred in holding that the covenant in the contract sued on in the instant case giving to respondents the preference right to do all future drilling at the prevailing contract price was either a covenant running with the leases, a profit a prendre, or an equitable servitude, which attached to such leases, and that such holding was an important ques-

tion of local law in conflict with applicable local and other decisions, petitioner cites a number of cases, but relies largely on quotations from textbooks set out in its brief, and on the cases of *G. C. & S. F. Ry. Co. v. Smith*, 9 S. W. 865 (Tex. Sp. Ct.); *Lakewood Heights Company v. McCuistion*, 225 S. W. 1109 (Tex. Civ. App.); *Montgomery v. Creager*, 22 S. W. (2d) 463 (Tex. Civ. App.); and *Spencer's Case*, 4 Coke 16.

The Smith case does not relate to Oil and Gas Leases, but to a covenant in a deed in which a right of way was created to a railway company, stipulating that whenever any portion of the land crossing the line of the railway should be enclosed and used for pasturage, the railway company should construct a fence on each side of the right of way. The court stated that it appeared the covenant was intended to protect livestock from injury by the railroad, rather than to confer a benefit upon the grantor and his assigns, and so did not affect the land itself.

The case of *Lakewood Heights v. McCuistion*, supra, cited and discussed by the petitioner, related to the sale of city lots, wherein it was held that the covenant of the owners of an addition to furnish to the purchaser of a lot in said addition, electricity and other utilities, terminated, and was no longer binding on the owners of such addition when the land was resold by the purchaser to a subsequent grantee.

Likewise, the case of *Montgomery v. Creager*, supra, as cited by the petitioner, concerned the sale of a filling station and the property upon which it was situated. The court held therein that the purchaser of

such station was not bound by an agreement of his vendor to purchase gasoline from the plaintiff.

Too, *Spencer's Case*, cited by the petitioner, relates to contracts of a similar nature. In other words, none of such cases relate to covenants running with an Oil and Gas leasehold estate. On the other hand, respondents cite, as authority for the theory that the covenant sued on was a covenant running with the leasehold estate, the case of *American Refining Company v. Tidal Western Oil Corporation*, 264 S. W. 335, error refused by the Supreme Court of Texas, in which it was said that:

> "It is the rule by the great weight of authority, that a covenant, or a condition which relates to the development of the mineral resources of lands in question, or work to be done thereon, or upon a royalty basis, is a covenant which runs with the land."

And in *Summers, on Oil and Gas*, in Section 553, at Page 303, it is said:

> "Express and implied covenants to drill, to reasonably develop the premises after discovery in paying quantities, and to protect the land from drainage, run with the land and can be enforced by the lessor, or his grantees, of the land or royalty interests, against the lessee and his assigns."

If the covenant to pay delay rentals or the implied covenant to reasonably develop the premises are covenants running with the land, why isn't it just as true that the covenant involved in the case before the court, which gives the respondents the right to do all future

drilling on the lease at the prevailing contract price is a covenant running with the land?

Even if the covenant should be held to be a personal covenant, however, the same would still be binding on petitioner for the reason that this case is essentially an equity case, all parties thereto, as well as the trial court, having treated same as an equity case involving equitable principles, and petitioner having purchased with notice and knowledge of the provision sued on ought to be, and is, bound thereby. In support of this theory, we cite the Texas case of *Anderson, et al., v. Rowland*, 44 S. W. 911. In that case, the agreement of a vendor of a lot not to allow the sale of intoxicating liquors in any building owned by him or afterwards conveyed in the same block in which the lot was situated for a period of five years, was held to bind grantees taking property subject to such agreement, and with notice thereof, even though such covenant was not one running with the land, the court saying:

> "It is enough that purchaser has notice of it, the question in equity being * * * not whether the covenant ran with the land, but whether a party shall be permitted to use the land inconsistently with the contract entered into by his vendor and with notice of which he purchased."

It is respondents further contention that the covenant giving to respondents the preference right to do all future drilling at the prevailing contract price was, at least, a profit a prendre or an equitable servitude attaching to the leases and to support this contention, we cite the cases of:

Sims v. Southern Pipeline Company, 195 S. W. 283, error refused;

Graham v. Omar Gasoline Company, 253 S. W. 896;

American Refining Company v. Tidal Western Oil Corporation, 264, S. W. 335, error refused;

Southwest Pipeline Company v. Empire Natural Gas Company, 33 Fed. (2d) 248.

The first case cited; namely, *Sims v. Southern Pipeline Company*, supra, is perhaps the leading case on the point. In that case, the plaintiff contracted to purchase a portion of all oil produced from a certain lease from one, West, the owner of the lease. West subsequently assigned the lease to Sims, who repudiated the agreement with the plaintiff. Plaintiff brought suit to obtain a temporary injunction against defendant and to secure a mandatory injunction requiring defendant to comply with the agreement. The court refused the injunction saying plaintiff's remedy at law for damages was adequate and stated:

> "It is a fair inference from this contract that the Omar Gasoline Company was to go upon the land and connect its pipes directly with the oil well thereon, and by means of vacuum extract the gas therefrom which would, perhaps, not otherwise be produced. Viewed in this light, the contract becomes in the nature of a grant of a profit a prendre, and imposed a servitude upon the property in the nature of an incorporeal hereditament, which would not lose its force or validity, although the land itself should pass to another purchaser, who, at the time of his purchase, had full notice of such servitude.

"And it might be said that a similar right is created by the casinghead gas contracts in question, and, even in the case of covenants, 'there is a growing tendency to incorporate equitable doctrines with common law rules, and in equity covenants relating to land or its mode of use or enjoyment are frequently enforced against subsequent purchasers with notice, whether named in the instrument or not, and though there is no privity of estate. Furthermore, it is immaterial in such cases whether the covenants run with the land or not; the general rule being that it will be enforced according to the intention of the parties.'"

The third case above cited, that of *American Refining Company, et al., v. Tidal Western Oil Corporation*, supra, also involved a gas contract and in this case, the contract was expressly recited to be a covenant running with the land. The court, however, went into a full discussion of the question of covenants running with the land and pointed out the ruling of Spencer's Case as the old common law technical point of view, and stated that under the new viewpoint of modern law, it made no difference whether the covenant was one running with the land or not as to whether the subsequent assignee was bound thereby.

The last case above cited, that of *Southwest Pipeline Company v. Empire Natural Gas Company*, involved a gas purchase contract and is very similar to the above Texas cases. In that case, the plaintiff contracted to purchase certain gas from wells drilled on a certain lease. Said lease was thereafter purchased by the defendant with notice and knowledge of the

contract. The plaintiff sought and obtained an injunction restraining the defendant from breaching the contract, and the defendant argued it was a personal contract and the defendant not having assumed same, was not bound thereby. The court, however, held that whether the defendant assumed the contract or not, it took with notice and knowledge of same, and that the contract created a profit a prendre, which was similar to an easement, the court saying:

> "While we are satisfied that the contract in question did create some interest in the leasehold in the nature at least of a right of profit a prendre, we do not deem it of importance as to whether such right would run with the land and the leasehold, because certain equitable rights were undoubtedly created by the contract which were enforceable according to the expressed intention of the parties against the assignee of the leasehold estate, if that assignee had notice of said rights."

The effect of the case of *Graham v. Omar Gasoline Company*, supra, is fully recognized in Summers' Oil and Gas, Volume 3, Page 305, where the Graham case is cited in support of the following text:

> "The assignee of a lease may likewise be bound by the agreements of the lessor with third persons for the sale of oil or gas produced from the lease upon the equitable theory that he bought with notice of the contract which imposed a servitude upon the property."

It might be argued that, inasmuch as these cases are considered to be, and treated as equity cases involving equitable servitude, the courts could not render

a personal judgment for damages for lost profits, as was done in the instant case, but could only give relief based on an injunction or specific performance. However, the first two of the last four cases hereinbefore listed and discussed as involving equitable relief, expressly recited that while the plaintiff was not entitled to specific performance through the medium of an injunction, he was entitled to prosecute a suit for damages. As said in the case of *Sims v. Southern Pipeline Company*, supra:

> "If when he (Simms) purchased the lease he knew that plaintiff had contracts that the oil produced from the property up to July 1, 1917, should be sold and delivered to it at the price named in the sales contract, *he would be bound by such contracts*, and the plaintiff would be entitled to recover damages for their breach, and if the facts justified such remedy to specific performance of the contracts."

Furthermore, it is a fundamental principle of equity that once jurisdiction has attached in an equity case, the court is entitled to adjust all rights and claims pertaining to the matter involved, even though it may be necessary to administer purely legal remedies. This rule is enunciated in 17 *Texas Jurisprudence*, pages 8 and 9, as follows:

> "On the other hand, if a court of equity has acquired jurisdiction of a subject of litigation and the persons whose interests are involved, it will adjust all rights and claims appertaining to the matter, leaving for future litigation nothing that can be disposed of in the exercise of equitable powers. Purely legal remedies will be administered.

"The rule is frequently applied where relief has been sought by injunction. For example, where jurisdiction has been acquired by virtue of an application for an injunction to restrain the sale of a chattel under execution, the court should hear evidence as to the rights and interests of the parties, and render such judgment as they are entitled to under the rules of equity proceedings. In such circumstances the court properly retains the cause for the purpose of decreeing damages for detention of the property by the officer and plaintiff in execution."

The case at bar originated as an equity case, respondents having first sought an injunction in the trial court, and certainly the court having proper jurisdiction of the case was authorized to render such judgment as respondents showed themselves to be entitled.

ARGUMENT IN SUPPORT OF POINT J

Under its Point J, both in its petition and its brief, petitioner urges that the Circuit Court of Appeals rendered an erroneous decision on an important point of local law, which is in conflict with the applicable local and other decisions, when it sustained the holding of the trial court to the effect that the rights and liability of the parties to this suit under the lease in question were to be determined by the law of landlord and tenant. In reply we point out first that the Circuit Court of Appeals, in holding petitioner bound by the covenant sued on, did not specifically determine whether such covenant in the instant case was a covenant running with the land, a profit a prendre, or equitable servitude, attaching to the leasehold estate, or whether, un-

der general principles of equity alone, the petitioner should be bound by the contract provision, but simply said:

> "We think it clear that when Dorr and Buffington and Smith entered into the contract they did so with the intention of burdening the lease and the development of the leasehold with a preferential right in appellees to perform all future drilling operations at the prevailing contract price. The British-American Oil Producing Company took assignments of interest in the lease with notice, actual and constructive, of the existence and terms of the preferential drilling right. It recognized the binding character of the covenant when it asked for bids for future drilling. It took its assignments subject to the contract and is bound by its terms";

and in support of such portion of its decision cited the following cases:

> *Anderson v. Rowland*, 44 S. W. 911;
> *Graham v. Omar Gasoline Co.*, 253 S. W. 896;
> *Southwest Pipeline Co. v. Empire Natural Gas Co.*, 33 F. (2d) 248;
> *American Refining Co. v. Tidal Western Oil Corporation*, 264 S. W. 335;
> *Pierce Fordyce Oil Ass'n. v. Woodrum*, 188 S. W. 245;
> *Southern Mineral Corporation v. Simmons*, 11 F. (2d) 333; 7 R. C. L. Sec. 18, p. 1101, Sec. 39, p. 1125;

some of which relate to general equitable principles, some to the doctrine of profit a prendre or equitable

servitude, and one, the case of *Pierce Fordyce Oil Ass'n. v. Woodrum*, supra, relates to the theory that, while an oil and gas lease does create a determinable fee estate and in that sense is a conveyance or sale, the liabilities and responsibilities of the parties thereto, as well as the character of the expressed and implied covenants therein, are determined by rules applicable to lease contracts and not to conveyances of land.

We respectfully submit that this case, cited by the Circuit Court of Appeals as one of the cases above set out to support the above quoted portion of its opinion, and the decision of the Circuit Court of Appeals based thereon, is not in conflict with the cases cited by petitioner in its brief of *Lamar v. Garner*, 50 S. W. (2d) 769; *Gordon v. Empire Gas and Fuel Company*, 63 Fed. (2d) 487; *Ehlinger, et al. v. Clark*, 8 S. W. (2d) 666; *Mound Valley Vitrified Brick Company v. Mound Valley Gas and Oil Company*, 268 Fed. 936; *Emerson, et al. v. Little Six Oil Company*, 3 Fed. (2d) 265; *G. C. & S. F. Ry. Co. v. Smith*, 9 S. W. 865; *Lakewood Heights Company v. McCuistion*, 226 S. W. 1109; and *Montgomery, et al., v. Craeger*, 22 S. W. (2d) 463. Of these cases so cited by petitioner, only the cases of *Lamar v. Garner*, supra, *Gordon v. Empire Gas and Fuel Company*, supra, and *Ehlinger, et al., v. Clark*, supra, specifically relate to oil and gas leases, and these three cases in no way are in conflict with the case of *Pierce Fordyce Oil Ass'n. v. Woodrum* for the reason that they do not go into a discussion as to the effect of the implied and expressed covenants of oil and gas leases, but simply hold that oil and gas leases

when executed and delivered operate as a conveyance or sale of a determinable fee estate. This doctrine of law is likewise recognized in the *Pierce Fordyce Oil Ass'n.* case, it having been the rule for some time in Texas that an oil and gas lease does create a determinable fee estate, and to that extent is a conveyance, and it is so held in the *Pierce Fordyce Oil Ass'n.* case. This case, however, involved not only the nature of the conveyance in an oil and gas lease but involved the further question as to whether or not the covenants contained therein were binding upon subsequent assignees thereof, and is therefore pertinent to the point at issue and is in support thereof, whereas the cases cited by petitioner do not purport to discuss that element of oil and gas leases; and, while the *Pierce Fordyce Oil Ass'n.* case involved a lease with an "or" clause, as distinguished from an "unless" clause, the principles involved are the same, so long as such lease is in effect. In said case the lease involved required the lessee to either drill within six months or to pay delay rentals for six months; it was assigned to the defendant, who refused to pay such rentals, and the plaintiff, the lessor in the lease, asked the defendant for the rentals provided for in the lease. The defendant contended it did not assume the payment of such rentals when it purchased the lease by assignment, that same did not constitute a covenant running with the land, and that it was not bound. The court in its original opinion agreed with the defendant that it was correct in its contention and that the case of *G. C. & S. F. Ry. Co. v. Smith*, hereinbefore cited by petitioner, was controlling. On rehearing, however, the court reversed its former judgment, holding that the Smith case was

not applicable and that the defendant, as the assignee of the lessee, was liable for such delay rentals, even though it did not assume same, and holding that, while under Texas laws an oil and gas lease creates an interest or estate in land, it is treated more nearly as a lease contract and not as a conveyance with respect to the obligations contained therein, and that the Smith case would not be applicable to an oil and gas lease but that rules applicable to lease contracts and not to conveyances of land should apply; and that the assignee, having taken with notice and knowledge of the covenant contained in the lease as to the payment of delay rentals, was bound thereby. That rules affecting lease contracts instead of conveyances of land are applicable to oil and gas leases in construing the obligations of the parties thereto, and their heirs and assigns, is further demonstrated by the well known rule established by many cases in Texas to the effect that the implied covenants in an oil and gas lease requiring the lessee to reasonably develop the premises and to protect the same from drainage run with the lease and are binding upon any subsequent assignee or purchaser thereof.

We respectfully submit that this case and the opinion of the Circuit Court of Appeals is in no way in conflict with the cases cited by the petitioner aforesaid, all of which merely hold that an oil and gas lease is a conveyance of determinable fee estate.

The case of *Mound Valley Vitrified Brick Company v. Mound Valley Gas and Oil Company*, supra, cited by petitioner, is, we think, not applicable in the instant case, and even that case, in holding the assignees of an

oil and gas lease not liable under a covenant of the assignor to furnish gas from the lease to a brick company, said: "Assignors are not bound at law, although they may be named, *but in certain instances they may be charged in equity;*" and, as hereinbefore pointed out, the case at bar was instituted as and treated as an equity case.

The case of *Emerson, et al., v. Little Six Oil Company*, supra, cited by petitioner, simply holds an oil and gas lease to be an interest in realty or a determinable fee estate.

The cases of *G. C. & S. F. Ry. Co. v. Smith*, supra, *Lakewood Heights Company v. McCuistion*, supra, and *Montgomery v. Craeger*, supra, cited by petitioner, have already been differentiated and distinguished in this brief by respondents, but we again point out that these cases in no way relate to oil and gas leasehold estates but to sales and conveyances of land, and the use thereof; the Smith case holding, for instance, that the agreement of a railway company to fence its right-of-way on land owned by the grantor was not a covenant running with the land, same being more for the protection of the livestock on the land than for the benefit of the land itself. Clearly, these cases are not in conflict with the decision of the Circuit Court of Appeals in the instant case.

ARGUMENT IN SUPPORT OF POINT K

Petitioner attempts to make the point hereunder that, as a general rule in a contractual action as distinguished from an action in equity, no action may be

maintainable between partners with respect to partnership transactions unless there has been an accounting or settlement of partnership affairs, and that the Circuit Court of Appeals, in affirming the decision of the trial court to the effect that the action in the instant case could be prosecuted, is an erroneous decision of an important question of local law which is in conflict with the applicabie local decisions. Petitioner in its argument hereunder in its brief virtually admits that a mining partnership was in existence at the time petitioner purchased its undivided interest in the leasehold estate, and such admission has the effect, in our opinion, of completely erasing the effect of the cases cited by petitioner in its argument hereunder, for the reason that all of such cases simply point out the applicability of the rule in general partnerships, and none of same involve mining partnerships, in which the rule is distinctly different. For instance, the case of *Hardee v. Adams Oil Assn.*, 254 S. W. 602, cited by petitioner, involved a suit by one stockholder in a joint stock association against the other stockholders, and the Court held that until there had been an accounting and settlement of the partnership affairs the suit could not be maintained. In this case the rules of the association expressly prohibited such a suit, although the court recognized the general rule that in a partnership of such general nature the suit could not have been maintained, even in the absence of such provision.

Likewise the case of *Brodage v. Greenwood*, 261 S. W. 453, cited by petitioner, which, incidentally, was a Court of Civil Appeals opinion and not a Texas Commission of Appeals opinion, as designated at page 54 of petitioner's brief, involved a joint stock company

or association, and the general rule was stated to the effect that one member could not sue the association for services rendered in the prosecution of the joint enterprise until he had first asserted his claim in an accounting.

In addition to these cases, petitioner cites one or two other cases from other jurisdictions, as well as commentaries from legal publications, but all of same relate only to the general rules of partnership, a mining partnership not being involved in any of the decisions.

On the other hand, the following cases clearly make the distinction that in a mining partnership the rule is different, and one partner may institute and prosecute an action against the partnership without first having an accounting or dissolving the partnership:

Gilbert v. Fontaine, 22 Fed. (2d) 657;
Indiohoma Refining Company v. Wood, 255 S. W., 212 (Tex. Civ. App.);
Moss and Urchell v. Clark, 82 S. W. (2d) 1090;
Greene v. Condor Petroleum Company, et al., 140 S. W. 844 (Tex. Comm. of App.)

Perhaps the distinction is best enunciated in the case of *Gilbert v. Fontaine*, 22 Fed. (2d) 657, supra, in which the court says:

> "It is contended by defendants that, even though a lien exists in favor of plaintiff, yet it cannot be foreclosed without a final accounting and a winding up of the affairs of the partnership. It is the general rule that an action at law involving partnership transactions cannot be maintained between partners until after an account and settlement. This rule, however, is by no means uni-

versal, even in ordinary partnerships. Thus, where there is an express stipulation in the partnership articles which is violated by one partner, an action at law will lie. And where the partnership agreement, as in the case at bar, provides for a periodical settlement of expenses, suit may be maintained therefor without seeking a dissolution of the partnership and a final account.

* * * * *

"Under these circumstances, we think this suit in equity may be maintained for a determination of the amount of the debt and for the establishment and foreclosure of the lien incident to the debt, without specifically praying for a final accounting or a dissolution of the partnership."

The rule is further enunciated in the case of *Moss and Urchell v. Clark*, wherein it is said:

"The expenditures made by appellants having been actually made in the necessary development, protection, and operation of the partnership property, appellants were authorized to bring an action at law against appellees for a contribution to the extent of one-half the actual expenditures so made, and this right is not dependent upon a general accounting between the parties. Indiohoma Refining Co. v. Wood, supra; Gilbert v. Fontaine (C. C. A.) 22 F. (2d) 657;"

plaintiffs and defendants having been in said case the joint owners of an oil and gas lease and plaintiffs having operated and developed the same with the acquiescence of the defendants.

In view of the existence of a mining partnership in

the case at bar, and in view of the distinction above made between the rule applicable to a general partnership and the rule applicable to a mining partnership, we think it is clear that the decision in the instant case in no way conflicts with the cases cited by petitioner. In this connection it is significant that the petitioner, British-American Oil Producing Company, in its cross-action against respondents, Buffington and Smith, in the trial court, asked to be reimbursed for respondents' proportionate cost of the drilling performed on the mining partnership property by the petitioner, and in this cross-action petitioner did not seek a dissolution of the partnership or ask for a general accounting, thereby impliedly acknowledging, at least, that in a mining partnership it is not necessary for one partner in suing another to ask for a dissolution and a general accounting, and incidentally thereby acknowledging the existence of a mining partnership.

ARGUMENT IN SUPPORT OF POINT L

In reply to the position taken by petitioner under its Point L in its petition and brief that the duty rested on the respondents to minimize their damages occasioned by the refusal of petitioner to permit them to drill at the prevailing contract price the wells drilled on the leasehold estate involved in this suit by obtaining other work and offsetting the profits, if any, made therefrom, respondents say herein first that in the situation involved in the case at bar there is no duty on respondents as drilling contractors to make any disclosure of or to account for the profits derived by them from other drilling operations, for the reason that drilling contrac-

tors ordinarily have a number of drilling contracts on hand at one time and usually are engaged in drilling at one time a number of wells, so that the breach of one of such drilling contracts by one owner would not require the drilling contractor to offset his damages sustained by such breach with the profits obtained in the drilling by him of the other wells under his contract. If such were the case, the drilling contractor, respondents herein, and not the owner, petitioner herein, would be the one penalized in the event of a breach of the contract by the owner. The cases cited generally by petitioner hereunder in its brief would appear to have no application. Even if it could be argued, however, that the rule that damages must be minimized by obtaining other work is applicable to the situation at bar, the burden is on petitioner and not on respondents to show the amount by which damages should be diminished, and this petitioner failed to do.

For the court's information in this connection, there are annotated in 15 *A. L. R.*, p. 768, Sec. G, three cases relating to the question of whether or not the rule requiring one to seek other employment in order to minimize damages for breach of a contract is effective as to the breach by owner of a drilling contract; these cases make it clear that the rule is not uniformly established in respect to situations of such nature. For instance, in the first case there listed, namely, the case of *Watson v. Gray's Harbor Buck Company*, 28 Pac. 527, the rule was held not to be applicable to a contract by which the plaintiff agreed to sink a well for the defendant at a stipulated price per foot, but was prevented from entering upon the work under the contract.

The second case therein listed, being the case of *Robertson v. Vandeventer*, 152 Pac. 107, holds the rule to be applicable, but apparently does so on the theory that the contract not only provided for the drilling of a well *but expressly provided for the plaintiff's personal service.*

And, while the third case therein listed is the Texas case of *Osage Oil & Refining Company v. Lee Farm Oil Company*, 230 S. W. 518 (Tex. Civ. App.), in which it is indicated that the rule might be applicable to the breach of a drilling contract by the owner, yet the court holds:

> "*But the burden is upon the defendant as to such matter*, Porter v. Burkett, supra; San Antonio Life Insurance Co. v. Griffith, 185 S. W. 338 (8), and authorities. While the evidence shows that the plaintiffs could have secured other employment for their drilling outfit, *it is not shown to what extent the damages would have been diminished thereby*, and the jury would have had no basis for a reduction of the damages on this account."

In the instant case the petitioner had ample opportunity to fully question respondents as to the nature of their other drilling operations, but wholly failed to elicit any proof of profits made therefrom. We believe the evidence shows that respondents made full and complete statements in answer to questions by petitioner's counsel, showing the nature of the other operations of respondents, and that from the evidence submitted it was impossible to determine whether any profit was made on such operations.

CONCLUSION

As indicated earlier in this brief, respondents believe that substantially the only theory advanced by petitioner for the purpose of invoking the jurisdiction of this Honorable Court is the proposition that the decision of the Circuit Court of Appeals in the instant case is an erroneous decision, in various instances, of an important question of local law and is in conflict with applicable local and other decisions.

Respondents respectfully submit to the court that in this brief they have in each and every instance clearly demonstrated that no conflicts exist and that no basis exists upon which to sustain and support the jurisdiction of this Honorable Court in the instant case.

Respondents respectfully pray that the petition and writ of certiorari be denied, and for such other relief to which they may be entitled.

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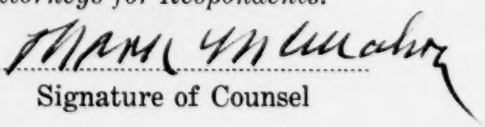

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